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Real Property

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REAL PROPERTY

by

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DURING the Survey period the courts decided numerous cases of interest in the area of real property law, and the Seventieth Legislature enacted changes in the area. This article reviews the more significant decisions and legislative enactments of the period.

I. TITLE AND CONVEYANCE

A. Conveyancing and Title Generally

In *City of Richland Hills v. Bertelsen*[1] the court dealt with the conflicting claims of a city and a land purchaser to certain lots. The purchaser acquired the lots and requested that the city vacate the recorded plat of the property. The city then informed the purchaser that it claimed a public park and easement as to a portion of the property pursuant to an unrecorded plat.[2] The trial court granted summary judgment in favor of the purchaser upon finding that he was a bona fide purchaser and that his predecessor in title had not dedicated the lots in question as a public park.[3]

On appeal, the court first recited the general rule that a bona fide purchaser for value is a person who has no notice and purchases property in good faith for valuable consideration.[4] Since the parties did not dispute that the purchaser had given value for the property, the court only had to determine whether the purchaser had notice of the city's claims. The plat relied upon by the city had not been filed in the real property records. The court therefore found that the purchaser had neither constructive notice nor a duty to search the city's records since nothing in the real property records constructively notified him of the existence of the plat relied upon by the city.[5] The court also found that the affidavits submitted in the summary judgment proceeding supported the trial court's holding that the purchaser did not have actual knowledge of the city's claim, and, accordingly, the

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1. 724 S.W.2d 428 (Tex. App.—Fort Worth 1987, no writ).

2. The opinion initially refers to the unrecorded plat as being an "antecedent unrecorded plat," but subsequently refers to the plat as being a "subsequent unsigned plat." *Id.* at 429-30.

3. *Id.*

4. *Id.* at 429 (citing Neal v. Holt, 69 S.W.2d 603, 609 (Tex. Civ. App.—Texarkana 1934, writ ref'd)).

5. 724 S.W.2d at 430-31.

court upheld the purchaser's bona fide purchaser status.[6] The city argued that its acceptance of the dedication of the park effectively terminated the power of the purchaser's grantor to convey the lots. The court of appeals, however, found that the dedication of the park to the city constituted the grant of an easement with the purchaser's predecessor in title retaining fee ownership that could be conveyed to the purchaser.[7]

The court faced an unusual fact situation in a suit for reformation of a deed in *Davis v. Grammer*.[8] The seller of property sought reformation of a deed that conveyed an entire lot rather than the western portion of the lot as the parties had agreed upon. At trial the purchaser of the property raised issues concerning fraudulent misrepresentations made by the seller's real estate agent and attorney regarding the status of a lease affecting the property. The court of appeals upheld the trial court's decision denying reformation because the seller of the lot had unclean hands by virtue of the fraudulent misrepresentations as to the lease and because the points of error raised by the seller on appeal did not adequately request reformation as a remedy, notwithstanding the findings of fraud.[9] The dissent would have granted reformation notwithstanding the finding of fraud, leaving the lot buyer to his remedies for the fraudulent statements, since the fraud in question did not go to the nature of the property description but rather to other matters.[10]

Davis v. Pletcher[11] dealt with claims concerning a shortage of acreage in a conveyance and the related acceleration of a purchase money debt. The dispute arose out of language in a general warranty deed concerning the time period within which a claim could be brought for shortages in the acreage purportedly conveyed.[12] The purchaser sent a mailgram to the seller stating that a survey obtained by the purchaser indicated that a shortage in acreage existed, asserting rights to an abatement of the purchase price because of the shortage and requesting a refund of overpaid interest. Subsequently, the purchaser sought to make the next required purchase money mortgage payment into the registry of the court, a request that the court later denied.[13] The sellers accelerated the debt because of the failure to make the full mortgage payment in question. On appeal the court of civil appeals reversed the trial court's judgment against the purchaser, finding that notice of the

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6. *Id.* at 431.

7. *Id.* (citing Popplewell v. City of Mission, 342 S.W.2d 52, 55 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.)).

8. 727 S.W.2d 18 (Tex. App.—San Antonio 1987, writ granted).

9. *Id.* at 23-24. The seller had raised only the factual insufficiency of the evidence concerning fraud on appeal. *Id.* at 24.

10. *Id.* at 24-25 (Chapa, J., dissenting).

11. 727 S.W.2d 29 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

12. The deed provided that "[s]uch covenant [as to acreage conveyed] shall be deemed to be broken only if Grantors are furnished by Grantee, within a period of five (5) years from the date hereof, with the results of a subsequent survey prepared by a licensed or a certified surveyor or licensed engineer covering the property conveyed hereunder which discloses by certified field notes and plat that there are fewer than six hundred and seventy (670) acres under fence . . . ." *Id.* at 33. The deed recited that it was executed as of July 1, 1977, but was not signed by the sellers until July 5, 1977.

13. *Id.* at 31.

shortage in acreage was timely given within the requirements of the deed.[14] The court also held that the acceleration was of no effect as it would have been inequitable to accelerate the indebtedness since the purchaser had given timely notice of the shortage in acreage claim, had offered to pay the full amount of the disputed mortgage payment into the registry of the court, and had further tendered to the sellers the next mortgage payment less a credit for the amount of interest overpaid because of the shortage in area.[15]

Houston Title Co. v. Ojeda De Toca[16] dealt with claims brought by a purchaser of a house arising out of the existence of a condemnation order issued by a city. The purchaser acquired an improved lot after the city issued a demolition order for the improvements that was filed in the real property records. Subsequently, pursuant to the order, the city demolished the improvements and posted a lien against the property for the demolition cost. The purchaser then brought suit against its seller and against the title insurance company that issued an owner's policy of title insurance in connection with the transaction alleging misrepresentation, negligence, gross negligence, violations of the Texas Deceptive Trade Practice Act[17] and real estate fraud statutes, and breach of fiduciary trust.[18] At trial the jury answered special issues in favor of the purchaser and the trial court entered judgment on the verdict.[19] On appeal the title insurance company first argued that the judgment against it on the negligence claims was in error as a matter of law because it owed no duty to discover the city order in question. The court of civil appeals agreed with this argument, noting that the obligation of a title insurer arises under its insurance policy, the relationship between insurer and insured being that of an indemnitor and an indemnitee, and held that there was no duty on the part of the title insurance company to discover title defects.[20] The sellers argued that the trial court had erred in granting judgment against them on the deceptive trade practice claims, relying on the recordation of the demolition order in the county records, asserting that the recordation was constructive notice of the order and that this notice constituted a defense as a matter of law. The court of civil appeals sustained this argument as well, stating that the constructive notice afforded by real estate recordation statutes is a defense to a cause of action under the Deceptive Trade Practice Act.[21] The seller's argument defeated the purchaser's claims concerning fraud as well, and the court reversed the judgment of the trial court and entered judgment in favor of the title insurance company and the

14. *Id.* at 34-35.

15. *Id.* at 35-36.

16. 733 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1987, no writ).

17. TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (Vernon 1987).

18. The court did not specifically identify the real estate fraud statutes, but presumably the relevant statute is *id.* § 27.01.

19. 733 S.W.2d at 326.

20. *Id.* at 327 (citing Tamburine v. Center Sav. Ass'n, 583 S.W.2d 942, 947 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.)).

21. *Id.* (citing Medallion Homes, Inc. v. Thermar Invs., Inc., 698 S.W.2d 400, 402 (Tex. App.—Houston [14th Dist.] 1985, no writ)).

sellers.[22]

The court interpreted a reverter provision contained in a deed in *Sewell v. Dallas Independent School District*.[23] The grantor had conveyed to a predecessor in interest to the Dallas Independent School District certain land on the condition that the property be used only for school purposes.[24] The school district so used the property for some time, but as a result of rulings against the school district in a desegregation suit, the school located on the property was closed and used as a storage facility for school equipment and supplies. Subsequently, the school district leased a majority of the land to the City of Dallas for use as a recreation center. The court of civil appeals, in reversing a judgment notwithstanding the verdict in favor of the school district, found that the language in the deed clearly created a condition subsequent.[25] The court then found that Sewell had introduced sufficient evidence at trial to show that the district had failed to use the property in question for school purposes, and held that the trial court had erred in entering judgment in favor of the district, even though a portion of the property was used as a maintenance facility by the district, and entered judgment in favor of the holder of the reversionary right.[26]

Wessely Energy Corp. v. Jennings,[27] although dealing with title to oil and gas interests, presents an issue concerning conveyancing of importance to all real estate practitioners. The supreme court addressed the constitutionality of a repealed coverture statute and the effect of its determination as to constitutionality on Texas land titles. Former article 1299 of the Texas Revised Civil Statutes,[28] repealed in 1963, required that a husband and wife join in conveying real estate that was the separate property of the wife.[29] In *Jennings* a predecessor in title to the current claimants had executed a deed admittedly not in compliance with former article 1299 and, thus, a dispute arose between those parties claiming under the deed and those parties claiming under the laws of inheritance.

The supreme court first analyzed the constitutionality of former article 1299 and had no difficulty finding that the former article was unconstitutional under both the United States Constitution and the Texas Constitution.[30] The court further found that the issue of constitutionality was clearly not mooted by virtue of the statute's repeal since the issue was squarely in

22. *Id.* at 328. The purchaser did not bring any contract claim against the seller, nor any claim against the title insurer under the title insurance policy.

23. 727 S.W.2d 586 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

24. The deed provided as follows: "This conveyance is made and accepted subject to the following condition: The herein conveyed property shall be used for school purposes only, and in the event of the breachof [sic] this condition, title to the hereinafter described propertyshall [sic] revert to and vest in the grantor herein, his heirs and assigns." *Id.* at 587.

25. *Id.* at 588 (citing, inter alia, City of Dallas v. Etheridge, 152 Tex. 9, 12, 253 S.W.2d 640, 641-42 (1952)).

26. 727 S.W.2d at 590-91.

27. 30 Tex. Sup. Ct. J. 530 (July 1, 1987).

28. TEX. REV. CIV. STAT. ANN. art. 1299, *repealed by* Act of June 10, 1963, ch. 473, §§ 1-2, 1963 Tex. Gen. Laws 1189, 1189-90.

29. 30 Tex. Sup. Ct. J. at 531.

30. *Id.* at 532 (citing Kirchberg v. Feenstera, 450 U.S. 455, 459-60 (1981); Stanton v.

front of the court. Since the statute was clearly unconstitutional, the court found that the parties had properly executed the deed in question and had therefore conveyed title.[31] The court then faced the issue of whether to make its ruling prospective only. The court held that its ruling would be prospective and would not apply to other title taken under a former article 1299 defect.[32] For the practitioner, this raises interesting issues because of the ambiguity as to what a former article 1299 defect is in the context of taking title. Presumably, only those deeds previously challenged in court and set aside will be left untouched by the decision.

In *Moore v. Rotello*[33] the court dealt with a dispute concerning the right to remove gravel from an abandoned railroad right-of-way. The party that removed the gravel had acquired the contractual right to remove portions of the gravel, railroad ties, and bridges remaining in the right-of-way after the railroad company had abandoned it, and had also attempted to acquire the actual right-of-way but evidently could not obtain clear title from the railroad. In defense of a claim of trespass the gravel remover alleged that the conveyance of the property adjoining the right-of-way to the abutting landowner had excluded the railroad right-of-way because of language in the deed saving and excepting the right-of-way. The court of appeals held that the issue was governed by the rules developed to deal with ownership of narrow strips of land, such as rights-of-way and easements abutting larger tracts, and found that the "save and except" language in the original deed was not an express reservation and had no effect other than to burden the grant originally made with the existence of the right-of-way.[34] The party removing the gravel had also argued that the gravel was personal property and was not part of the underlying real estate, but the court found that over a sixty-five year period the gravel had become so intermingled with the soil that it had become part of the realty.[35] Since the gravel was not personalty and the removing party had no right to enter the abandoned right-of-way, the court found the removing party liable for the resulting damages.[36]

B. Perpetuities

Garza v. Sun Oil Co.[37] dealt with construction of the rule against perpetuities. The owners of a surface estate brought suit to clear title to certain property and to determine the rights to certain royalty payments, alleging

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Stanton, 421 U.S. 7, 17 (1975); Burroughs v. Lyles, 142 Tex. 704, 711-12, 181 S.W.2d 570, 574 (1944)).

31. 30 Tex. Sup. Ct. J. at 533.

32. *Id.* at 533-34.

33. 729 S.W.2d 372 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

34. *Id.* at 375-76 (citing Lewis v. East Tex. Fin. Co., 136 Tex. 149, 154, 146 S.W.2d 977, 980 (1941) (when an instrument conveys described land and excepts a right-of-way, road or easement, the instrument conveys fee title to the entire tract unless the instrument clearly indicates an intent to reserve the strip of land)). The court also found that the abandonment of the right-of-way did not affect application of the principle. *Id.*

35. *Id.* at 376.

36. *Id.* at 375-76.

37. 727 S.W.2d 115 (Tex. App.—San Antonio 1986, no writ).

that they had acquired the property in question by exercise of an option granted in a previous surface lease.[38] The parties holding conflicting royalty claims asserted that the option was void under the rule against perpetuities. The court of civil appeals held the option invalid, finding by the clear language of the option that the interest might not vest until after the restricted period and, accordingly, that the option was void and could not be exercised.[39]

C. *Statute of Frauds*

In *Penwell v. Barrett*[40] the court dealt with the requisites for taking an oral contract for the sale of real estate out of the statute of frauds. A daughter and her husband moved into a home owned by her father after spending several months renovating the property. At trial they alleged that they had agreed with her father to pay rent for a period of time and then orally agreed to purchase the property, applying rental payments towards the purchase price, which was to be the appraised value of the property. The court of civil appeals found that the evidence adduced at trial was sufficient to support upholding the oral contract for the sale of land, applying well settled Texas law concerning the elements required to take an oral land sale contract out of the coverage of the statute of frauds.[41]

D. *Flooding*

In *Abbott v. City of Princeton*[42] the court reversed a summary judgment in favor of a city as against an action brought by landowners for damages resulting from flooding of their land.[43] The landowners initially brought suit in 1982 alleging that certain actions of the city in connection with work on a street adjoining their land caused flooding. Subsequent to the institution of the suit, the landowners conveyed the tract in question. The court granted

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38. The option provided as follows: "At the expiration of thirty (30) years from [September 12, 1938], or *at any time thereafter*, if LESSEES, their heirs or assigns, during the entire term of this lease have punctually and fully complied with all of their obligations under this lease, then and in that event LESSORS hereby give LESSEES, *their heirs and assigns*, the option to purchase the above described land . . . ." *Id.* at 117 (emphasis by the court).

39. *Id.* at 117-18. The court stated that the rule against perpetuities "provides that no interest is valid unless it must vest, if at all, within 21 years after the death of some life or lives in being at the time of creation of the interest, plus the normal gestation period when necessary," and that a "grant or interest which may not timely vest within that period of time and which operates to take property out of commerce and restrict its alienation, is void." *Id.* at 116 (citing Henderson v. Moore, 144 Tex. 398, 401, 190 S.W.2d 800, 801 (1946); Brooker v. Brooker, 130 Tex. 27, 39, 106 S.W.2d 247, 254 (1937)).

40. 724 S.W.2d 902 (Tex. App.—San Antonio 1987, no writ).

41. *Id.* at 904. The court noted that the elements required for exemption from the statute are as follows:

> (1) payment of the consideration, whether it be in money or services; (2) possession by the vendee; and (3) the making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor or, or without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced.

Id. (citing Hooks v. Bridgewater, 111 Tex. 122, 1209, 229 S.W. 1114, 1116 (1921)).

42. 721 S.W.2d 872 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

43. *Id.* at 876.

the city summary judgment because by conveyance of the property the landowners had lost their cause of action, because their suit was barred by limitations, because the city was not a person within the meaning of the relevant statute, and because the landowners were not damaged because the property had increased in value over the period in question.[44]

In reversing and remanding for trial the court of appeals first dealt with the question of whether the landowners had lost the right to maintain their action by conveying the property. The court found that an owner can still pursue an action to recover damages incurred while he owns the property even if he conveys the property during the suit.[45] In dealing with the limitations issue, the court found it necessary to determine the type of injury sustained. Since the flooding occurred sporadically following rainfall, the owner suffered intermittent injury that was irregular and contingent upon an outside force.[46] The court found that suit could be maintained for injuries sustained during the two-year period prior to the filing of the suit.[47] As a third ground, the city alleged that it was not subject to the claim brought by the landowners under section 11.086(a) of the Texas Water Code[48] inasmuch as the city was not a "person" within the meaning of the statute.[49] The city relied upon a previous Texas Supreme Court decision[50] to support its position. The court of appeals, however, noted that this decision preceded the codification of the Texas water control statutes and found that the city was a "person" for purposes of the Texas Water Code by virtue of the provisions of the Texas Code Construction Act.[51] Finally, the appellate court found that although the tax rolls showed an increase in the value of the property, this increase was not compelling evidence that the owners had suffered no loss, since evidence could be produced to show that the property had not appreciated as much as it would have absent the acts complained of.[52] The court therefore reversed the summary judgment and remanded the case for trial.[53]

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44. *Id.* at 874.

45. *Id.* at 875 (citing Richey v. Stop N Go Markets of Texas, Inc., 643 S.W.2d 505, 507 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 654 S.W.2d 430 (Tex. 1983)).

46. *Id.*

47. *Id.* The court noted that a suit for permanent damages to land accrues on the date of the first injury and that the limitation period would expire two years after that date. *Id.*

48. TEX. WATER CODE ANN. § 11.086(a) (Vernon Supp. 1988).

49. Section 11.086(a) of the Texas Water Code provides that "No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded." *Id.*

50. City of Houston v. Renault, Inc., 431 S.W.2d 322, 324 (Tex. 1968).

51. 721 S.W.2d at 876. The Texas Code Construction Act provides, in relevant part, that the term "person" includes "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (Vernon Supp. 1988). A predecessor to this provision was in effect at the time of the granting of summary judgment. Act of June 12, 1967, ch. 455, § 1, 1967 Tex. Gen. Laws 1036, *repealed by* Act of June 11, 1985, ch. 479, § 224, 1985 Tex. Sess. Law Serv. 3361 (Vernon).

52. 721 S.W.2d at 876.

53. *Id.*

E. Trespass to Try Title

During the Survey period Texas courts addressed several cases with interesting issues concerning trespass to try title actions. *Singleton v. Terrel*[54] dealt with the standards required for a party to prevail in a trespass to try title suit. The plaintiffs in the suit were the successors in interest to a purchaser from the State of Texas. The property had been forfeited to the State because of failure to pay deferred purchase money pursuant to the relevant statutes.[55] The predecessor in title to the defendants in the suit purchased the land from the State before the end of the five year period allowed for reinstatement following a forfeiture under a deed that the plaintiffs claimed was a forgery. The defendants had been in possession of the land since 1970. Finding that neither the plaintiffs nor their predecessors in title had taken any action to set aside the forfeiture, the court of appeals held that they were not able to prevail in a trespass to try title suit since a requisite of such a suit is that the plaintiff rely on the strength of its own title and not the deficiencies of the defendant's title.[56] Although the plaintiffs contended that the defendant's title was void, the court noted that this contention did not make the patent to the defendant's predecessor in title void and further found that the plaintiffs had no standing to raise any defect in the State's patent to the defendant's predecessor.[57] Accordingly, the court of appeals affirmed the trial court's holdings that the plaintiffs did not establish title and held that the defendants had adjudicated title as possessors of the property.[58]

In *Williams v. Ballard*[59] the court of civil appeals held that the veterans land board, as the vendor under an executory contract for deed, was not a necessary party to a trespass to try title action brought by a party claiming title by virtue of adverse possession.[60] The trial court dismissed the case because of the failure of the adverse possessor to name the veterans land board as a defendant. The court of civil appeals reversed, citing the established rule in trespass to try title cases that the only necessary defendant is the person in possession of the land.[61] The court found that the interest of the veterans land board was comparable to the interest of a mortgagee since equitable title had passed to the vendee and the rights retained by the board were similar to rights reserved under a mortgage or deed of trust.[62] The

54. 727 S.W.2d 688 (Tex. App.—Texarkana 1987, no writ).

55. TEX. REV. CIV. ANN. art. 5326 (Vernon 1962) (current version at TEX. NAT. RES. CODE ANN. §§ 51.071, 51.074 (Vernon 1978)).

56. 727 S.W.2d at 690 (citing Hunt v. Heaton, 643 S.W.2d 677, 679 (Tex. 1982)).

57. *Id.* at 691 (citing Betts v. Texas Pac. Land Trust, 524 S.W.2d 564, 565 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)).

58. *Id.*

59. 722 S.W.2d 9 (Tex. App.—Dallas 1986, no writ).

60. *Id.* at 11.

61. *Id.* (citing Booty v. O'Connor, 13 S.W.2d 220, 226 (Tex. Civ. App.—Galveston 1928), *aff'd sub nom.* Brooks v. O'Connor, 120 Tex. 121, 125, 39 S.W.2d 22, 24 (1931)).

62. *Id.* (citing City of Garland v. Wentzel, 294 S.W.2d 145, 147 (Tex. Civ. App.—Dallas 1956, no writ)). Adverse possession rights will generally not run against the sovereign. *See* Parker v. Brown, 80 Tex. 555, 557, 16 S.W. 262, 262 (1891). Since the veterans land board is an instrumentality of the State of Texas, joinder of the veterans land board in the suit might well have led to a determination that adverse possession could not be maintained against it.

court also determined that although an interest in avoiding multiplicity of litigation exists, the contract vendee failed to make a sufficient showing of probable multiplicity of litigation that would require joinder of the veterans land board.[63]

Dillon v. Hodges[64] discusses located and unlocated land certificates and their effect on titles to Texas real estate. The plaintiffs in the suit instituted a trespass to try title action to establish title. The United States Court of Appeal for the Fifth Circuit, after reviewing Texas law on the issue, upheld the district court's judgment that all of the disputants were tenants in common.[65] The story in this case commenced with the issuance of a land certificate in 1909 containing a legal description of the land in question. Various mesne conveyances followed thereafter until the property was conveyed to a trustee. The parties in the case stipulated that the trustee took whatever rights he acquired in trust for six parties who each owned an undivided one-sixth interest in the property. Subsequently, the trustee filed a notice of termination of trusteeship and made the final payment of deferred purchase consideration to the State of Texas whereupon a patent as to the land was granted in the name of one of the predecessors in title to the trustee.

The plaintiffs argued that the original land certificate was personal property that did not convey title to real property, that legal title to the land was not conveyed to anyone until the patent issued from the state, that title had vested in the original trustee after termination of the trust, and that the beneficiaries of the former trust did not receive an interest in the land because no title vested in the trustee prior to the issuance of the patent.[66] The defendants argued that all of the disputants were tenants in common inasmuch as the land certificate operated to segregate the land, that the certificate constituted an interest in realty, and that upon termination of the trust, equitable title to the real estate had vested in all of the beneficiaries of the trust.

Applying Texas law, the appellate court noted that land certificates are either located or unlocated, the determination being dependent upon whether the specific land in question had been surveyed and the survey attached to the certificate.[67] Unlocated land certificates vest no interest in land, while located land certificates have the opposite effect and create a real property interest.[68] Thus, once land has been surveyed and located, the owners of the located certificate have property rights, including the right to bring a trespass to try title action as between parties with competing inter-

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The court did not deal with the issue of what would happen if the contract vendee subsequently defaulted on his contract for deed and the equitable title vested in him reverted to the veterans land board. *Parker* suggests that title would be revested in the state, free of the claim of the adverse possessor. 80 Tex. at 557, 16 S.W.2 at 262.

63. 722 S.W.2d at 12.

64. 804 F.2d 1384 (5th Cir. 1986).

65. *Id.* at 1385.

66. *Id.* at 1387.

67. *Id.*

68. *Id.* (citing Sledge v. Humble Oil & Ref. Co., 340 S.W.2d 517, 520 (Tex. Civ. App.—Beaumont 1960, no writ); Wantland v. Cowdin, 87 S.W.2d 529, 532 (Tex. Civ. App.—Texarkana 1935, writ dism'd)).

ests, and any priority issues are to be determined as of the date of location of the land and not from the date of issuance of a patent.[69] The court also noted that the owner of a located certificate does not lose his interest in the property by virtue of the fact that another person might pay any remaining unpaid purchase money to the State of Texas and have a patent issued in its name, because the patent benefits the true owner of the land in such a circumstance.[70] Similarly, the court noted that Texas law clearly provides that when a certificate is owned by more than one person and insufficient evidence exists to identify any particular parcel as being for the exclusive benefit of a particular owner, then the land will be treated as being held for the benefit of all as tenants in common.[71] The court, in applying the foregoing principles, found that the parties' interests must be determined with references to priority of the location of the land, which occurred when the original certificate was issued; therefore, all of the beneficiaries of the remote trustee had an interest in the property and constituted tenants in common.[72]

F. Lis Pendens

Moss v. Tennant[73] dealt with the proper grounds for filing a notice of lis pendens. A homeowner filed suit against the seller of the home alleging, among other matters, breach of warranty, negligence, deceptive practices, and fraud. He then filed a notice of lis pendens against a house subsequently bought by the seller, seeking establishment of a constructive trust and claiming an equitable interest in the new house to the extent it was purchased with the proceeds he had paid to the seller for acquisition of the seller's old house. The court found that the filing of the lis pendens was improper as the homeowner was not trying to recover title to the new house nor claiming an interest therein except in the nature of security for the future recovery of damages.[74] The court found that the lis pendens was in effect a request for a judgment lien and therefore did not come within the relevant statutory provisions.[75]

G. Legislation

Two significant bills were enacted, which are mentioned here in brief, but which will be applicable to any real estate practice, are House Bill No. 2193[76] which enacts the Uniform Fraudulent Transfer Act in the State of

69. 804 F.2d at 1388.

70. *Id.* (citing Atlantic Ref. Co. v. Noel, 443 S.W.2d 35, 38 (Tex. 1968); Abbott v. Gulf Prod. Co., 100 S.W.2d 722, 724 (Tex. Civ. App.—Beaumont 1936, writ dism'd)).

71. 804 F.2d at 1388 (citing Kirby v. Estell, 78 Tex. 426, 431, 14 S.W. 695, 696 (1890)).

72. 804 F.2d at 1388-89.

73. 722 S.W.2d 762 (Tex. App.—Houston [14th Dist.] 1986, no writ).

74. *Id.* at 763.

75. *Id.* Section 12.007 of the Texas Property Code provides for the filing of a lis pendens when an action involves "title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property . . . ." TEX. PROP. CODE ANN. § 12.007(a) (Vernon 1984).

76. Uniform Fraudulent Transfer Act, ch. 1004, § 1, 1987 Tex. Sess. Law Serv. 6805 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. §§ 24.01-.013).

Texas and Senate Bill 563[77] which enacts the new Texas Revised Limited Partnership Act. Both of these statutes need to be reviewed in a depth that is beyond the scope of this survey, but it is worth noting that the new Uniform Fraudulent Transfer Act provides that a regularly conducted, noncollusive foreclosure sale will be deemed to constitute a transfer for reasonably equivalent value and will not be subject to attack as a fraudulent conveyance under the state statute.[78]

House Bill 1881[79] adds a new section 35.53 to the Texas Business and Commerce Code dealing with choice of law provisions in written contracts. The provision applies to a contract if any element of the execution of the contract occurs in Texas and one of the parties to the contract is either an individual resident of Texas or an association or corporation created under the laws of Texas or having its principal place of business in Texas.[80] If these requisites are met and the contract contains a provision making the contract or any conflict arising thereunder subject to the laws of another state, to litigation in the courts of another state, or to arbitration in another state, then the provision must be set out in boldface print; otherwise, the provision is voidable by the party sought to be charged.[81] Unfortunately, the legislative draftsman used the term "boldface print" without defining it in the statute, thus creating ambiguity as to what exactly constitutes boldface print. Those parties typing contracts on equipment other than modern word processors may find this a difficult provision with which to comply.

Senate Bill No. 1075[82] specifically prohibits any person other than a licensed attorney from charging or receiving, directly or indirectly, any compensation for the preparation of a legal instrument affecting title to real property, including deeds, mortgages, and transfers and releases of liens.[83] The Act contains provisions permitting attorneys to utilize secretarial and paralegal help and specifically does not prevent a person from completing lease or rental forms that have been prepared by a licensed attorney or property owner.[84] The Act is also inapplicable to a licensed real estate broker or salesman performing the acts of a real estate broker pursuant to provisions of the Texas Real Estate License Act.[85] The Act specifically provides for recovery of fees paid and damages equal to three times the amount of the fees paid plus recovery of court costs and reasonable attorneys' fees.[86] These

77. Texas Revised LImited Partnership Act, ch. 49, § 1, 1987 Tex. Sess. Law Serv. 187 (Vernon) (to be codified at TEX. REV. CIV. STAT. ANN. art. 6132a-1).

78. 1987 Tex. Sess. Law Serv. at 6805.

79. Act of June 19, 1987, ch. 812, § 1, 1987 Tex. Sess. Law Serv. 5642 (Vernon) (to be codified at TEX. BUS. & COM. CODE ANN. § 35.53).

80. 1987 Tex. Sess. Law Serv. at 5642-43.

81. *Id.* at 5643.

82. Act of June 20, 1987, ch. 1080, § 2, 1987 Tex. Sess. Law Serv. 7408 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 320f, §§ 1-5 (Vernon Supp. 1988).

83. 1987 Tex. Sess. Law Serv. at 7408-09.

84. *Id.*

85. *Id.* The Texas Real Estate License Act is found at TEX. REV. CIV. STAT. ANN. § 6573a (Vernon Supp. 1988).

86. Act of June 20, 1987, ch. 1080, § 3, 1987 Tex. Sess. Law Serv. 7409 (Vernon).

remedies are cumulative of other remedies available.[87]

II. BROKERS

Claims by brokers gave rise to several cases during the Survey period. In *Elin v. Neal*[88] the court dealt with the applicability of the statute of frauds provisions contained in the Texas Real Estate License Act[89] to a licensed attorney. The attorney had sued to collect a real estate commission allegedly due based upon an oral agreement to obtain federally guaranteed financing for certain apartment projects. The attorney claimed that the developer had agreed to pay compensation for assistance in locating financing. The developer denied the existence any agreement and alleged, in the alternative, that even if such an agreement existed, the failure of the parties to reduce it to writing resulted in unenforceability. The trial court granted the developer's motion for directed verdict based upon the provisions of the Texas Real Estate License Act requiring that an action brought for recovery of a real estate transaction commission be evidenced by a written agreement.[90] Although the appellate court found the developer's arguments for application of the statute of frauds provision to attorneys compelling, the court nonetheless followed the unambiguous language of the statute and held that an attorney is totally exempted from the provisions of the Texas Real Estate License Act, including the statute of frauds provision.[91]

The interpretation of a lease in connection with a claim for commission on a sale of property was the subject matter of *Campagna v. Lisotta*.[92] A broker had negotiated a lease agreement and received a commission. The lease also provided that if the property was sold to the lessee pursuant to a specific provision of the lease, then the lessor owed the broker a further commission. The lease provision in question granted an option to the lessee to acquire the property, but the provision should more properly be classified as a right of first refusal.[93] Subsequently, the lessor sold the property in question to the lessee directly, and the broker sued for a commission. The court of civil appeals, applying the strict language of the lease, noted that the lease stated that if the property was sold pursuant to the terms of the option provisions of the lease, then the lessor owed the broker the commission.[94] Referring to the specific provision of the lease, the court found that the property had not been sold subsequent to receiving a bona fide offer from a third party as required by the provisions of the lease, and that, accordingly, the broker had

87. *Id.*
88. 720 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).
89. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1988).
90. 720 S.W.2d at 225.
91. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6573a, § 3(a) (Vernon Supp. 1988)). The court also relied on Young v. Del Mar Homes, Inc., 608 S.W.2d 804, 807 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), in which the court found that a real estate salesman was exempted from the same statute of frauds provision by virtue of the provisions of § 3(f) of the Texas Real Estate License Act. 720 S.W.2d at 226.
92. 730 S.W.2d 382 (Tex. App.—Dallas 1987, no writ).
93. *Id.* at 384.
94. *Id.*

not earned a commission under the express terms of the lease.[95] The court also rejected the broker's claim for a commission under a theory of quantum meruit, applying the statute of frauds provision in the Texas Real Estate License Act to defeat the broker's claim.[96]

In *Meisler v. Smith*[97] the Fifth Circuit discussed the requirements for recovery of a brokerage commission based upon a broker's obligation to find a purchaser who is ready, willing, and able to buy property. The owners of an apartment project had executed a listing agreement with a broker providing for payment of a commission if, during the term of the agreement, the broker produced a purchaser who was ready, willing, and able to buy the property at a price and at terms agreeable to the owner. The broker subsequently delivered to the owners five separate earnest money contracts for acquisition of the property on varying terms. Each of those contracts, however, contained what is commonly termed a free look provision in the real estate industry. These provisions allowed the purchasers to terminate the contract without liability in the event they were not satisfied, in their own discretion, with the status of the property. The apartment owners responded to the contracts by sending back a list of other conditions they wished to have included in the contract. Some of the original offerees did not respond to the list of questions, others made counteroffers that were not acceptable, but ultimately the owners of the projects entered into a contract containing a free look provision with one of the original offerees. That offeree, however, subsequently terminated the contract under its free look provision. The broker then brought suit, claiming that he was entitled to a commission under the contractual language. At trial the jury found that four of the five prospective purchasers satisfied the ready, willing, and able condition, and the district court therefore entered judgment in favor of the broker for his commission plus attorney's fees.[98]

The Fifth Circuit reversed the trial court's judgment.[99] The court first noted that a Texas court would award a commission if the broker and buyer have an enforceable contract of sale, even if the transaction thereafter does not close, unless language to the contrary exists in the relevant agreement.[100] Applying the basic rule to this case, the court rejected the owner's argument that a consummated sale was required for the broker to earn the commission since the language of the listing agreement did not so provide.[101] In so holding, the court also rejected a contention by the owners that provisions in the contracts providing that commissions would be payable upon closing of the transaction would supercede the listing agreement.[102] The court then considered whether obtaining earnest money contracts with free look provisions

95. *Id.*
96. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1988)).
97. 814 F.2d 1075 (5th Cir. 1987).
98. *Id.*
99. *Id.* at 1076.
100. *Id.* at 1078 (citing Hoyt R. Matise Co. v. Zurn, 754 F.2d 560, 566 (5th Cir. 1985)).
101. 814 F.2d at 1079.
102. *Id.*

satisfied the broker's obligation to provide a purchaser ready, willing, and able to close. Reviewing Texas law on the issue, the court held that a contract containing a free look provision creates an inference that the purchaser is not ready, willing, and able to close, and that unless the broker rebuts this inference by competent evidence, the broker is unable to recover.[103] The court found that the evidence introduced at trial was not sufficient to overcome the inference in respect of the contracts that were not executed.[104] As to the contract that was executed, the broker alleged that the buyer failed to close because of a title defect, but the court found this argument unpersuasive since the buyer specifically linked the notice of termination to the free look provision of the contract rather than to the provisions of the contract dealing with title defects.[105] The court accordingly reversed the district court and entered judgment in favor of the owners.[106]

III. HOMESTEADS

In the homestead area interesting case law and legislative developments occurred during the Survey period. In *Johnson v. Cherry*[107] the Texas Supreme Court once again dealt with the question of whether a deed absolute on its face was actually an impermissible mortgage on a homestead. A landowner, in dire financial straits and unable to borrow money, executed on the same day a deed conveying land that included his homestead, a one-year leaseback of the land, and an option to repurchase the land. In return, the purchaser advanced money to the landowner and assumed certain of the landowner's indebtedness. The exercise of the option was conditioned on the landowner making two semi-annual payments of rent under the lease. The landowner subsequently failed to make one of these payments, whereupon the purchaser instituted eviction proceedings, which in turn led to counterclaims from the landowner claiming that the transaction was a loan, and alleging usurious interest and other matters.

The Texas Supreme Court noted that the question of whether an instrument that, on its face, constitutes a deed is actually a mortgage is a question of fact, and that even though the instrument appears on its face to be absolute, parol evidence is admissible to show the parties' true intent.[108] The court found that the landowner had introduced sufficient evidence at trial to support the jury's finding that the parties intended the instrument as a mort-

103. *Id.* at 1080. The apartment owners relied primarily on Moss & Raley v. Wren, 102 Tex. 567, 570, 120 S.W. 847 (1909) (purchaser entering contract that allows him to refuse to take the property is not ready, willing, and able), while the broker relied primarily on Hamburger & Dreyling v. Thomas, 103 Tex. 280, 283, 126 S.W. 561 (1910) (broker is entitled to commission upon execution of option contract even if the sale fails to close later due to failure to produce good title). 814 F.2d at 1080.

104. 814 F.2d at 1082.

105. *Id.* at 1082-83.

106. *Id.* at 1083.

107. 726 S.W.2d 4 (Tex. 1987).

108. *Id.* at 6 (citing Wilbanks v. Wilbanks, 160 Tex. 317, 318-19, 330 S.W.2d 607, 608 (1960); Wells v. Hilburn, 129 Tex. 11, 15-16, 98 S.W.2d 177, 180 (1936)).

gage rather than an absolute conveyance.[109] The court also held that when a deed constitutes a mortgage, equity requires the mortgagor to offer to repay the indebtedness in question. The court accordingly found the landowner indebted for the funds advanced and granted the lender a lien on the portion of the land in question that did not constitute the landowner's homestead.[110]

In re Niland[111] delineates the risks of lending against collateral that may constitute homestead property and the lengths to which Texas law will extend to protect the holder of a homestead, even in the face of deplorable conduct. The debtor in the case had on several occasions financed property that was ultimately determined to be his homestead to obtain funds for use in business. In connection with each loan the debtor signed affidavits stating that a different piece of property was his homestead. In the final loan transaction, in addition to executing a false affidavit, he also paid a bribe to a loan officer of the lending institution. The debtor, however, was occupying the subject property at the time that the various affidavits were executed. On another occasion the debtor successfully persuaded a judgment creditor to release a lien against a condominium unit that was not the subject of the case at hand, alleging that this unit was his homestead. After experiencing financial difficulty, the debtor first tried to sell the property, but the property was posted for foreclosure and another party bought the property at foreclosure sale, receiving a substitute trustee's deed. The debtor failed to vacate the premises following foreclosure, and the purchaser at the foreclosure sale instituted proceedings to obtain possession. The debtor then filed for bankruptcy protection. In the bankruptcy proceeding, the debtor successfully avoided the foreclosure, alleging that the property in question had been his homestead and that the liens were improper.[112]

The Fifth Circuit held that the property was a homestead because the debtor had occupied the property, more or less continuously, for more than fifteen years.[113] The court noted that, under Texas law, homestead status is presumed to continue once established, and that the burden is upon the party claiming that no homestead exists to so prove.[114] The court next addressed the issue of whether the debtor was estopped from claiming the homestead as such in light of his numerous fraudulent activities. The court found that Texas law clearly does not provide for estoppel in this sort of case, as to allow the estoppel argument to prevail based upon affidavits and other agreements obtained by lenders would permit the protection afforded

109. 726 S.W.2d at 7. The facts adduced at trial included testimony that the repurchase price was 10% more than the original price, that the property was worth almost double the sale price, and that the lease payments equalled 18% interest on the purchase price; furthermore, the landowner had told a real estate agent shortly before the sale that he was not interested in listing his property for sale.

110. *Id.* at 8. The Texas Legislature has adopted a new section to the Property Code dealing specifically with the issues raised in *Johnson v. Cherry*. TEX. PROP. CODE ANN. § 41.006 (Vernon Supp. 1988).

111. 825 F.2d 801 (5th Cir. 1987).

112. Niland v. Deason, 50 Bankr. 468, 478 (Bankr. N.D. Tex. 1985).

113. 825 F.2d at 806-07.

114. *Id.* at 808 (citing McFarland v. Rousseau, 667 S.W.2d 929, 931 (Tex. App.—Corpus Christi 1984, no writ)).

by the homestead statutes to be easily avoided.[115] The court characterized this rule as being "based on a recognition that many in financial difficulties will sign anything to obtain money from lenders" and went on to note that is exactly what had happened in the case at hand.[116] Accordingly, the court rejected the arguments of the purchaser at the foreclosure sale, distinguishing the cases cited by the purchaser that had dealt with estoppel in the homestead circumstances.[117]

Having found that the property constituted the debtor's homestead and that he was not estopped from so claiming, the court examined the claims of the purchaser at the foreclosure sale as against the lender holding the liens foreclosed upon. The court found no breach of warranty, since the warranty in the substitute trustee's deed ran from the owner of the property, the debtor, to the purchaser and not from the lender.[118] The court also found no basis for the imposition of a constructive trust given the facts of the case.[119] The court next turned to the claims of the purchaser for warranty and fraud against the debtor and found that no valid warranty claim existed since invalid liens on a homestead are void and foreclosure of such a lien cannot create a warranty obligation.[120] In so holding, the court reiterated the general rule that bidders in a foreclosure sale in Texas purchase at their own risk.[121] The court also rejected an argument that an equitable lien should be placed against the homestead property, since such a lien would circumvent the Texas homestead protections.[122] The court next addressed the issue of designating a one-acre homestead site out of the 1.5417-acre property in question and remanded the case to the bankruptcy court so that the debtor could make such a designation.[123] The court awarded the purchaser at the foreclosure sale title to the remaining .5417 acres, as well as rights of subrogation to the previous lender's rights against the debtor under the note and deed of trust previously foreclosed upon, a rather hollow right in light of the bankruptcy of the debtor and the invalidity of the lien securing the debt.[124]

The legislature enacted four significant statutes dealing with homesteads during the survey period. House Bill 2024[125] codified the holding of the Texas Supreme Court in *Johnson v. Cherry*[126] by adding a new section 41.006 to the Texas Property Code. The new section specifies that any sale

115. *Id.* at 808-09 (citing Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 89, 13 S.W. 12, 13 (1890)).
116. *Id.* at 809.
117. *Id.* (citing Lincoln v. Bennett, 138 Tex. 56, 61-62 156 S.W.2d 504, 506-07 (1941)).
118. *Id.* at 811-12.
119. *Id.*
120. *Id.* at 813.
121. *Id.* at 813-14 (citing Henke v. First Southern Properties, Inc., 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)).
122. *Id.* at 814.
123. *Id.* at 815-16.
124. *Id.*
125. Act of June 19, 1987, ch. 1130, § 1, 1987 Tex. Sess. Law Serv. 7771 (Vernon) (codified at TEX. PROP. CODE ANN. § 41.006 (Vernon Supp. 1988)).
126. *See supra* notes 107-10 and accompanying text.

of a homestead at a fixed price less than the appraised fair market value of the property in which the buyer leases the property back to the seller at rental payments exceeding the fair rental value of the property will be deemed a loan, and that all payments made by the seller to the buyer in excess of the sales price will be reclassified as interest.[127] The legislature provided that such a transaction is a deceptive trade practice, that the deed is void, and that no lien attaches to the homestead as a result of the alleged sale.[128] The statute is inapplicable to the sale of a family homestead among family members as defined by the act.[129]

House Bill 275[130] adds a new section 41.005 to the Texas Property Code requiring home improvement contracts creating an encumbrance on homestead property to contain a conspicuously printed warning at least equal to ten point bold type or the computer equivalent to be located next to the owner's signature line on each document.[131] The specific provisions of the required notice are set out in the statute and a failure to include the warning constitutes a deceptive trade practice.[132]

House Bill 710[133] also adds a section 41.005 to the Texas Property Code, providing for the voluntary designation of homestead by filing a written designation with the county clerk of the county where the property is located complying with the provisions of the statute.[134] The designation must contain a statement that the parties executing the instrument are designating property as a homestead, the name of the original grantee of the property and, of course, a description of the property so designated.[135]

Senate Bill No. 21[136] revises section 11.13 of the Tax Code to make clear that a homestead may consist of an indirect interest in real property through ownership of stock in a corporation incorporated under the Cooperative Association Act.[137]

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127. TEX. PROP. CODE ANN. § 41.006 (Vernon Supp. 1988).

128. *Id.*

129. *Id.* The Property Code defines family members to which the act does not apply as "a parent, stepparent, grandparent, child, stepchild, brother, half brother, sister, half sister, or grandchild of an adult member of the family." *Id.* § 41.006(c).

130. Act of May 19, 1987, ch. 116, § 1, 1987 Tex. Sess. Law Serv. 556 (Vernon) (codified at TEX. PROP. CODE ANN. § 41.005 (Vernon Supp. 1988)). House Bill 710, discussed *infra* note 133-35 and accompanying text, also adds a new § 41.005 to the Texas Property Code, a mistake that the codifiers will no doubt sort out.

131. *Id.*

132. *Id.*

133. Act of June 20, 1987, ch. 727, § 1, 1987 Tex. Sess. Law Serv. 5226 (Vernon) (codified at TEX. PROP. CODE ANN. § 41.005 (Vernon Supp. 1988)).

134. *Id.* The legislature's enactment of two sections 41.005 was apparently an accident. *See supra* note 130.

135. 1987 Tex. Sess. Law Serv. at 5226-27. Query what is meant by the "original grantee"—the original patentee from the state, the immediate seller to the party filing, or someone else?

136. Act of June 18, 1987, ch. 547, § 1, 1987 Tex. Sess. Law Serv. 4407 (Vernon) (codified at TEX. TAX CODE ANN. § 11.13(o)-(p) (Vernon Supp. 1988)). The Cooperative Association Act is found at TEX. REV. CIV. STAT. ANN. art. 1396-50.01 (Vernon Supp. 1988).

137. TEX. TAX CODE ANN. § 11.13(o)-(p) (Vernon Supp. 1988).

IV. EMINENT DOMAIN

Two interesting cases arose in the field of eminent domain during the Survey period. *FDIC v. Texas Electric Service Co.*[138] dealt with the right to a condemnation award as between competing lienholders. The condemnor took a small parcel out of a larger tract encumbered by both first and second liens. The entire award was paid over to the first lienholder and the second lienholder appealed, arguing that, upon a partial taking, a mortgagee is entitled to receive only that portion of the condemnation award as would compensate him for the impairment of his security.[139] The first lienholder's mortgage provided for partial releases of lien upon payment of a specified amount per acre. Payment of this amount in relation to the land condemned would have constituted approximately one-fifth of the total award. Evidence at the trial, however, indicated that the value of the entire tract had decreased and was continuing to decrease. The court of appeals upheld the trial court's judgment awarding the entire condemnation award to the first lienholder, holding that the evidence supported the finding that the remaining value of the property was too little to assure repayment of both debts.[140]

Leeco Gas & Oil Co. v. County of Nueces[141] involved an attempt by a county to condemn the reversionary right to property being used as a public park. A grantor had deeded land to a county for use as a park, retaining a reversionary interest such that the property would revert to the grantor if a park were not constructed and maintained by the county. The county maintained the property as a park, but then instituted condemnation proceedings against the reversionary interest. At trial, the court awarded the original grantor nominal damages for its reversionary estate.[142]

The Texas Supreme Court first dealt with the grantor's argument that the county was estopped from condemning the property by acceptance of the deed with the reversion provision. The court, rejecting this argument, noted that acquisition of land to maintain a park is a governmental function and held that a governmental body exercising governmental powers is not subject to the doctrine of estoppel.[143] The court then noted that a possibility of reverter generally has no value that can be measured when the event that would cause the reversion is not likely to occur within a reasonably short period of time.[144] The supreme court noted that the trial court had relied on other decisions in reaching its holding, but distinguished these decisions since they related to competing claims for condemnation awards as between the owner of a possessory interest and the owner of a future interest in the subject property.[145] The court therefore noted that, constitutionally, con-

138. 723 S.W.2d 770 (Tex. Civ. App.—El Paso 1986, no writ).

139. *Id.* at 771. The appellant relied upon Buell Realty Note Collection Trust v. Central Oak Inv. Co., 483 S.W.2d 24, 27 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

140. 723 S.W.2d at 772.

141. 30 Tex. Sup. Ct. J. 562 (July 8, 1987).

142. *Id.*

143. *Id.* (citing City of Hutchins v. Prasifka, 450 S.W.2d 829, 835 (Tex. 1970)).

144. *Id.*

145. *Id.* The trial court relied on Sabine River Auth. v. Willis, 369 S.W.2d 348, 350 (Tex.

demnors of land must adequately compensate the landowner, and that the minimal award in this case was not adequate as a matter of law.[146] The court went on to hold "that when a governmental entity is the grantee in a gift deed in which the grantor retains a reversionary interest, if that same governmental entity condemns the reversionary interest, it must pay as compensation the amount by which the value of the unrestricted fee exceeds the value of the restricted fee."[147]

V. RESTRICTIVE COVENANTS

Issues concerning interpretation and enforcement of restrictive covenants were fertile ground for litigation during the Survey period. As is generally the case in restriction cases, the individual fact situations were often determinative. In *Wilmoth v. Wilcox*[148] the Texas Supreme Court addressed the question of whether a double-wide manufactured home placed upon a lot violated restrictive covenants prohibiting house trailers. The lot owners moved a new double-wide manufactured home onto a lot, removed the wheels, placed a covering around the perimeter, and added a porch. Other lot owners brought suit for the removal of the home, alleging that its presence violated restrictive covenants affecting the property, and succeeded at trial. The court of civil appeals reversed, however.[149] The Texas Supreme Court, after discussing the basic rules applicable to enforcing and interpreting restrictive covenants,[150] addressed the issue of whether an older restrictive covenant prohibiting house trailers was meant to exclude manufactured housing. The court concluded that the intention of the covenants was to restrict any kind of house trailer, mobile home, or manufactured home, however denominated, and accordingly affirmed the judgment of the trial court.[151]

Tanglewood Homes Association v. Henke[152] points out the importance that a severability clause can have in a suit to enforce restrictive covenants. A homeowner's association had brought suit alleging that a homeowner had

1963), and City of Houston v. McCarthy, 464 S.W.2d 381, 387 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (possibility of reverter has only nominal value).

146. 30 Tex. Sup. Ct. J. at 563.

147. *Id.* In a concurring opinion joined in by Justices Robertson and Kilgarlin, Justice Campbell indicated that he would hold that if a governmental body accepts a gift deed granting a determinable fee interest, institution of condemnation proceedings by the grantee against the reversionary interest would constitute a renunciation of the gift. *Id.* at 563-64 (Campbell, J., concurring). Under both the majority and the concurring view governmental authorities should be dissuaded from trying to accept gifts of park land and then subsequently condemning the reversionary interest for nominal value.

148. 734 S.W.2d 656 (Tex. 1987).

149. *Id.* at 657. The restrictive covenants provided that "[n]o building, house, or cabin shall be moved onto any lot in this addition from other locations unless they are new construction. . . . No tents, house trailers or temporary structures shall be permitted to remain on any lot for more than 30 days." *Id.*

150. *Id.* at 657-58.

151. *Id.* at 658 (citing Lassiter v. Bliss, 559 S.W.2d 353, 356 (Tex. 1977); Gigowski v. Russell, 718 S.W.2d 16, 19 (Tex. App.—Tyler 1986, writ ref'd n.r.e.); Bullock v. Kattner, 502 S.W.2d 828, 829-30 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.)).

152. 728 S.W.2d 39 (Tex. Civ. App.—Houston [1st Dist.] 1987, no writ).

constructed certain improvements in violation of the applicable restrictive covenants. The trial court had denied injunctive relief and the association appealed. The record reflected that the restrictive covenants in question had been recorded in 1950, that by their terms they were for the purpose of carrying out a uniform plan for the subdivision, and that reference to the restrictions was contained in the deeds conveying the property in question.[153] The restrictive covenants also contained a severability clause.[154] The homeowner had made several additions to his home adding a chimney, a new room, a spa, and a pool equipment room that violated various setback line restrictions imposed by the restrictive covenants. At trial, the jury affirmatively answered special issues to the effect that the restrictive covenants had been abandoned with regard to building setback lines and the height of fences and the trial court had entered judgment based thereon.[155]

On appeal the association did not challenge the finding concerning the fence height restriction, but contested the holding that the building setback lines had been abandoned. The court of civil appeals noted that the restrictions dealt with setback requirements in two different provisions, one applicable to the main residence built on a lot and the other applicable to attached garages and out buildings.[156] The court found sufficient evidence introduced at trial to support the finding that the setback requirements with regard to garages and out buildings had been abandoned, as fifteen homes out of fifty-six in the section in question had attached garages or carports that materially violated the setback line requirement. The court accordingly upheld the jury's finding that the setback restriction with regard to these types of structures had been waived.[157] The court, however, found the evidence insufficient to support the finding that the setback requirements concerning main residences had been waived, since the record reflected that only five homes violated this restriction, with the range of violation from 5 inches to 13.8 inches.[158] Taking into account the severability provision, the court held that the waiver of the setback provision as to garages and out buildings did not constitute a waiver of the separate provision applicable to main residences.[159] The appellants had also alleged that the restrictive covenants did not establish a general plan for development since, pursuant to the express

153. *Id.* at 41.

154. *Id.* The severability clause provided "and if any one of such restrictions shall be held to be invalid, or for any reason is not enforced, none of the others shall be affected or impaired thereby, but shall remain in full force and effect." *Id.*

155. 728 S.W.2d at 42-43.

156. *Id.* at 43.

157. *Id.*

158. *Id.* at 43-44.

159. *Id.* The court applied the following standard: "To establish abandonment, a party must prove that the violations are so great as to lead the mind of the average man to reasonably conclude that the restriction in question has been abandoned." *Id.* (citing Cowling v. Colligan, 158 Tex. 458, 461-62, 312 S.W.2d 943, 945-46 (1958)). The court also noted that the factors to be taken into account in determining if a violation has occurred are "the number, nature, and severity of the then existing violation, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant." *Id.* (quoting New Jerasulem Baptist Church, Inc. v. City of Houston, 598 S.W.2d 666, 669 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ)).

provisions of the restrictions, the association had power to modify them, preventing the imposition of a general plan. The court of civil appeals declined to deal with this issue, since the appellants did not allege that the association had applied its discretionary powers.[160] The court noted that the existence of a power to modify a restrictive covenant does not render it unenforceable, and, applying the severability clause, noted that this provision could be deleted from the covenants without destroying their entire effect.[161] The homeowner finally argued that the court should balance the parties' equities and that he should not be required to remove the improvements, taking into consideration the detriment to him and the probable benefit to the association and other owners. The court rejected this argument as well, noting that one who seeks equity must do equity.[162] The court pointed out that the association had expressly advised the homeowner of the potential violations in meetings and in letters but that, nonetheless, the homeowner had continued with construction, indeed quickening the pace of construction after receipt of a letter specifying the violations in question.[163]

Homsey v. University Gardens Racquet Club[164] involved a dispute concerning restrictive covenants requiring payment of dues and assessments for membership in a racquet club. A homeowner bought a lot in a subdivision encumbered by recorded restrictive covenants that required owners to pay dues and assessments to a racquet club. The owner refused to pay, and the owners association obtained a summary judgment for the dues and assessments. The homeowner appealed, alleging that he did not have notice of the restrictions in question, the covenant was not reasonable and was not for the exclusive use and benefit of lot owners, and that, by failing to enforce the covenant, the association had waived the covenant.[165]

The court of civil appeals first dealt with the argument that the covenant did not touch and concern the land in question. The gravamen of the owner's argument was that the exclusivity of the racquet club had been destroyed because it had been opened to the public, provided that new public members were approved by a board of directors and that such members paid an initiation fee. The court of appeals noted that the main element in determining whether a covenant touches and concerns land is whether its relation to the property is such as to increase in value and confer benefits on the owners.[166] The court then found that the covenant in question benefited lot owners and further conferred benefits not available to members of the general public because lot owners within the subdivision paid no initiation fee and the board of directors did not approve their membership.[167] Accord-

160. *Id.* at 46.
161. *Id.*
162. *Id.* at 49.
163. *Id.*
164. 730 S.W.2d 763 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).
165. *Id.* at 764.
166. *Id.* (citing Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.)).
167. *Id.* at 765.

ingly, the court found the homeowner's argument unpersuasive.[168] The court next addressed the waiver issue and found that the restrictive covenants had not been waived since the only evidence adduced at trial was the fact that the homeowner's bringing the suit had not been charged the dues and assessments while he was the owner of a different lot in the subdivision.[169] The court found that this single incident was not sufficient to sustain the burden of proving waiver.[170] Since the homeowner had constructive knowledge of the restriction in question, the court of civil appeals upheld the summary judgment granted in favor of the association.[171]

Independent American Real Estate v. Davis[172] involved questions concerning whether restrictive covenants had been waived or rendered ineffective as to a border lot. Developers brought suit seeking to declare that due to changed conditions certain restrictive covenants restricting the use of their property to single-family residences were no longer enforceable. The developers owned a large tract that was on the outside border of the subdivision affected by the restrictions. The evidence supporting the developers' motion for summary judgment consisted of the affidavits of two appraisers stating that the value of the developers' property would significantly increase if the restrictive covenants were removed and that the deed restrictions were no longer necessary to protect the interior lots of the subdivision nor would their removal reduce the value of the lots. The trial court granted summary judgment in favor of the homeowners.[173]

On appeal, the developers argued that the summary judgment was improper since, due to changed conditions, the deed restrictions no longer secured their initial intended benefits. The court of civil appeals rejected this as a matter of law, finding that the matters alleged by the developers did not amount to changed conditions and that the deed restrictions still did obtain their intended benefits.[174] The court of civil appeals also noted that a change in zoning permitting commercial development on the property in question did not abrogate the plan of development or the restrictions.[175]

The court addressed the release of certain restrictive covenants in *L. R. French v. Diamond Hill-Jarvis Civic League*.[176] A lot owner sought a declaratory judgment that certain restrictive covenants had been released and no longer affected his property, but the trial court found that the restrictive

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 746-765.
172. 735 S.W.2d 256 (Tex. App.—Dallas 1987, no writ).
173. *Id.* at 258.
174. *Id.* at 260-61. The court noted that the developers did not introduce adequate evidence of changed conditions. The original developers had apparently anticipated that the city would widen the boundary road in question. The church, although owning the unrestricted lot, did not build on the lot. No owners of restricted lots engaged in commercial development, even though other persons established commercial properties across the street from the restricted area.
175. *Id.* at 260 (citing Lebo v. Johnson, 349 S.W.2d 744, 751-52 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.)).
176. 724 S.W.2d 921 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

covenants were still in effect.[177] The court of appeals, applying the language of the covenants, found that a majority of the owners of the affected lots had voted to release the restrictive covenants and that a majority vote of the owners of the lots was unnecessary.[178] The court expressly found that the provisions of the restrictive covenants allowing a specified percentage of owners to amend the covenants in whole or in part included the right to completely release or abolish the covenants.[179] Finally, the court found that the owners, in circulating releases of the covenants for execution, satisfied the requirement that a majority vote of owners occur, since no reason existed for a prior circulation of a petition.[180]

In *Rosas v. Bursey*[181] a homebuyer bought a vacant lot and sought to move a house on it. Adjoining lot owners brought suit to enforce the restrictive covenants affecting the lot requiring that plans for improvements be submitted for prior approval. The homebuyer subsequently submitted plans that were approved. The parties entered into a written settlement agreement that recited that the restrictive covenants encumbered the homebuyer's lot and provided for completion of the external improvements as to the new house within a ninety day period. The homebuyer then moved the house on the lot but failed to perform all external improvements within the ninety day period. The adjoining lot owners again brought suit seeking to enforce the settlement agreement and to require removal of the improvements from the property in accordance with the terms of the agreement. In upholding the trial court's judgment requiring removal of the house and awarding attorneys' fees, the court of civil appeals found that the restrictive covenants were in effect and encumbered the lot in question and had not been waived by failure of enforcement based on summary judgment evidence presented.[182]

In *Permian Basin Centers for Mental Health & Mental Retardation v. Alsobrook*[183] a group acquired a home in a subdivision for use as a family home for six mentally retarded adults and two house parents. Another homeowner in the addition brought suit to enjoin such use, alleging that such use would violate the restrictive covenants affecting the property.[184] The court of civil appeals, applying the facts to the language of the restrictive covenants, found that the covenants in question restricted only the na-

177. *Id.* at 922.

178. *Id.* at 923. The covenants in question provided as follows: "These covenants and restrictions are to run with the land and shall be binding on all parties and all persons claiming under them until JANUARY 1, 1985, at which time said covenants shall be automatically extended for successive periods; of ten years unless by a vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part." *Id.*

179. *Id.* at 924 (citing Couch v. Southern Methodist Univ., 10 S.W.2d 973, 973-74 (Tex. Comm'n App. 1928, judgmt adopted). *But see* Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)).

180. 724 S.W.2d at 924.

181. 724 S.W.2d 402 (Tex. App.—Fort Worth 1986, no writ).

182. *Id.* at 407.

183. 723 S.W.2d 774 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

184. *Id.* at 775. The provision in question provided that "[n]o structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling, not to exceed two stories in height, and a private garage for not more than two cars . . . ." *Id.*

ture of the structure to be erected on residential lots within the subdivision and not the character of use, and therefore held that the proposed use would not violate the restrictive covenant in question.[185]

House Bill 356[186] adds new chapters 202 and 203 to the Texas Property Code, dealing with the construction and enforcement of restrictive covenants and certain other matters. The statute applies to all restrictive covenants, even those created prior to enactment.[187] The more important provisions in the act are a requirement that restrictive covenants be liberally construed to give effect to their purposes and intents, that an exercise of discretionary authority by an owners association will be presumed reasonable unless a court determines by a preponderance of the evidence that the exercise was arbitrary, capricious, or discriminatory, and, that the county attorney is authorized to enforce restrictive covenants in counties with a population of more than two million people.[188]

VI. EASEMENTS AND ROADS

Rutten v. Cazey[189] dealt with the obligation of the grantee of an easement to perform certain activities. The grantors had granted an access easement that expressly provided that the grantee would build and maintain a fence, gates, and cattle guards. The grantee evidently failed to do this, and when the grantor sued, the trial court rendered judgment in favor of the grantor for the costs to effect necessary repairs.[190] The grantee argued that the easement, which was in writing and had been recorded, did not satisfy the statute of frauds, evidently because the grantee had not executed or expressly accepted the easement. The court of civil appeals rejected this argument, noting that the grantee by accepting a warranty deed is bound by its provisions even though the grantee has not executed the deed.[191] The court found that the same rule is applicable to an easement as an interest in land.[192]

Vrazel v. Skrabanek[193] dealt with questions concerning prescriptive easements and estoppel. The owner of several lots upon which a dirt road was located changed the locks to the gate to the road, thereby denying a lessee access to a separate parcel. The lessee brought suit for damages incurred due to his inability to reach the leased parcel, pleading a right to use the road by virtue of rights of prescription. The trial court rendered judgment for the

185. *Id.* at 776-77. The court of civil appeals found the case analogous to Collins v. City of El Campo, 684 S.W.2d 756, 761-62 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). *But see* Shaver v. Hunter, 626 S.W.2d 574, 576 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.), *cert. denied*, 459 U.S. 1016 (1982).

186. Act of June 18, 1987, ch. 712, § 1987 Tex. Sess. Law Serv. 5171 (to be codified at TEX. PROP. CODE ANN. §§ 202.001-.005, 203.001-.005)).

187. *Id.*

188. *Id.*

189. 734 S.W.2d 752 (Tex. App.—Waco 1987, no writ).

190. *Id.* at 753.

191. *Id.* at 755.

192. *Id.* (citing Greene v. White, 137 Tex. 361, 386-87, 153 S.W.2d 575, 589 (1941); Wall v. Lower Colo. River Auth., 536 S.W.2d 688, 691 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)).

193. 725 S.W.2d 709 (Tex. 1987).

lessee, but the court of civil appeals, in an unpublished opinion, reversed that judgment.[194]

The Texas Supreme Court first upheld the finding that no easement by prescription existed as to the road since the lessee and his predecessors in title had used the road with the consent of the lot owner.[195] However, it was clear that the road in question had been in use for over fifty years and there was also a dedicated easement that would provide access to the leased lot. The dedicated easement was located to the east of the actual road and had been obstructed by the lot owner. The supreme court found that the lot owner had a duty to keep the dedicated easement free from interference, which he had breached, that the location of the easement had been changed with the consent of both parties to the actual road, and that once the exchange had occurred, the lot owner was estopped to deny the exchange.[196] Accordingly, the supreme court reversed the court of appeals and affirmed the judgment of the trial court.[197]

The court reviewed the authority of a county commissioners' court to close a publicly dedicated road in *Smith County v. Thornton*.[198] In determining that the county commissioners' court had power to close a portion of a road, following proper compliance with the Open Meetings Act,[199] the Texas Supreme Court noted that commissioners' courts generally possess the power to open, alter, change, or abandon any public road.[200] This power is limited, however, since the commissioners' court does not have the right to close a public road or portion thereof over the protest of an owner of land abutting the closed portion.[201] When the owner's land abuts a publicly dedicated road at other than the portion closed, however, the county commissioners' court may close the road.[202] The owner's remedy is then a cause of action for the diminishment in the value of the land caused by the impairment of right of access.[203]

VII. LANDLORD AND TENANT

A. Construction and Interpretation

In *Pioneer Oil Co. v. Vallejo*[204] the court considered whether or not a

194. *Id.* at 709.

195. *Id.* at 711 (citing Othen v. Rosier, 148 Tex. 485, 493, 226 S.W.2d 622, 626-27 (1950)). The court also noted that since both the lot owner and the lessee had used the road, the lessee did not meet the exclusivity requirement. *Id.* (citing Brooks v. Jones, 578 S.W.2d 669, 673 (Tex. 1979)).

196. 725 S.W.2d at 711-12 (citing Dortch v. Sherman County, 212 S.W.2d 1018, 1021 (Tex. Civ. App.—Amarillo 1948, no writ)).

197. *Id.* at 712.

198. 726 S.W.2d 2 (Tex. 1986).

199. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(h) (Vernon Supp. 1988).

200. 726 S.W.2d at 3 (citing Morris v. Cassidy, 78 Tex. 515, 516-17, 15 S.W. 102, 103 (1890)).

201. *Id.*

202. *Id.*

203. *Id.*

204. 736 S.W.2d 227 (Tex. App.—Corpus Christi 1987, no writ).

written contract constituted a lease. Landowners had entered into an agreement styled "lease and operating agreement" with a convenience store operator. The agreement provided for installation and operation of self-service gasoline pumps. The landowners, in the same agreement, agreed to sell gasoline, collect proceeds, and deposit the same for the account of the convenience store operator. The agreement described the land in question and provided for a term of five years with renewal rights. The landowners subsequently assigned their rights in the agreement, and the assignee desired to install additional gas pumps, separate from those installed by the convenience store operator. A dispute then arose as to whether the lease and operating agreement constituted a contractual arrangement for marketing of gasoline or a true lease.

The court of civil appeals reversed the trial court and found that the agreement clearly constituted a lease as it characterized itself as a lease, adequately described the land in question, provided for rental, and otherwise had the attributes of a lease.[205] Having found that the agreement constituted a lease, the court also found that the tenant, the convenience store operator, had been granted exclusive possession of the premises, and therefore had the exclusive right to use the premises, including the vending of gasoline therefrom.[206]

In *Myers v. Ginsberg*[207] the court decided several issues arising out of a dispute between a lessor and a lessee. The lessee removed certain property from the leased premises and then defaulted in rent payments. After the default, the lessee attempted to remove more equipment when the lessor appeared and demanded that the removal of the equipment cease because it was subject to a landlord's lien for rent. The lessor asked for and received delivery of the keys to the premises. The lessor then took possession of the equipment and neither returned it nor sold it. The lessor filed suit against the lessee to recover arrearages of rent and certain tax and insurance premiums that were required to be paid under the lease. The lessee counterclaimed, alleging breach of the lease, conversion, and violation of the Deceptive Trade Practices Act. After trial, the court entered judgment notwithstanding the verdict in favor of the lessor for recovery of rent, taxes, and insurance premiums.[208]

The court of civil appeals dealt with a series of issues raised on appeal by the lessee. The court first addressed whether under the terms of the lease a credit was required to be given against rent for the fair market value of the equipment taken. The court held that the question of whether the lessor was required to credit the value of the equipment against rent was a question of law for the court's determination and that the trial court did not err in disre-

205. *Id.* at 229-30 (citing Holcombe v. Lorino, 124 Tex. 446, 454, 79 S.W.2d 307, 310 (1935)).

206. *Id.* at 230 (citing Cleveland v. Milner, 141 Tex. 120, 126, 170 S.W.2d 472, 475-76 (Tex. Comm'n App. 1943, opinion adopted)).

207. 735 S.W.2d 600 (Tex. App.—Dallas 1987, no writ).

208. *Id.* at 602.

garding the jury's finding as to this issue.[209] The lessee next argued that he was entitled to an offset against the amounts owed because the lessor, upon seizing the equipment, was required to either sell the equipment and credit to rent the net proceeds or credit the fair market value of the equipment. The court disagreed with this particular contention in this context, characterizing the lessee's claimed set-off right as being based upon an independent claim for damages arising out of an independent cause of action, and, thus, the lessee was not entitled to an automatic offset or credit until he had proved the cause of action for damages. If successful on the damages question, the lessee might be entitled to offset the judgment for the value of the equipment against the lessor's judgment for rent.[210] The lessee next argued that a specific provision of the lease constituted a liquidated damage or penalty clause.[211] The court rejected this argument, applying traditional rules of construction to find that the clause in question implemented the landlord's lien provisions of the lease by requiring that the lessee not remove its property from the leased premises at a time when he was in default, and that the clause did not constitute either a liquidated damages or penalty provision, nor did it provide for a contractual transfer of title upon termination of the lease, as the lessor had alleged.[212]

The court then turned to the question of whether the lessor had violated the contractual provisions of the lease. The lessee had alleged that under specific provisions of the lease the lessor could enter the premises only through proper judicial procedures. The court, however, rejected this argument, finding that the lessor had not breached the lease, since another provision of the lease specifically provided for the lessor's entry upon the premises, the lessor took no acts to expel the lessee, and the lessee delivered the keys upon request, which constituted a surrender of the premises.[213] Similarly, the court held that removing the equipment without judicial process did not constitute a conversion because the lessor had the express right to do so under the terms of the lease.[214] The court, however, went on to state that, although the lessor was authorized to take the equipment, he did not have the right to take and hold the equipment indefinitely.[215] Since the lessor was obligated to either dispose of the property by sale within a reasonable period of time or credit the value of the property taken against amounts owed, and since the lessor's failure to do either act might be sufficient to support the lessee's counterclaim for conversion, the court remanded this

209. *Id.* (citing Davis v. Andrews, 361 S.W.2d 419, 424 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)).

210. *Id.* at 603.

211. *Id.* The provision relied upon by the lessee stated that "[a]t the expiration or termination of this lease, tenant shall have the right to remove such items so installed provided tenant is not in default at the time of such removal . . . ." *Id.*

212. *Id.* at 603-04.

213. *Id.* at 604 (citing Edward Bankers & Co. v. Spradlin, 575 S.W.2d 585, 587 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ)).

214. *Id.* (citing Sunray Enterprises, Inc. v. Rosenaur, 335 S.W.2d 670, 672 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.)).

215. *Id.* at 605.

issue for new trial.[216] The final issue addressed was whether the lessees had stated a cause of action under the Deceptive Trade Practice Act.[217] The court noted that the transaction may be a violation of the Deceptive Trade Practice Act, which provides that a representation that a contract provides rights that it does not afford can form the basis for a cause of action.[218] On this issue the court reversed the trial court and remanded the case for a new trial.[219]

United Interests, Inc. v. Brewington, Inc.[220] illustrates the necessity for clear drafting of lease provisions. The owner of an office building, who had acquired the building subject to an existing master lease and subleases, notified a sublessee that it had leased a surface parking area to a third party for other use and that the sublessee would no longer have access to the area. The sublessee immediately brought suit for a declaratory judgment that it was entitled to use the parking area under the specific provisions of its sublease.[221] The court of civil appeals found that the language of the lease was ambiguous, and that the trial court's admission of parol evidence was therefore proper to determine the parties' true intention.[222] The evidence introduced at trial established that the sublessee had a right to use the parking area in question.[223] Accordingly, the court upheld the trial court's order enjoining the owner from interfering with the sublessee's use.[224]

Plaza of the Americas, Ltd. v. Rodgers[225] presented an interesting case dealing with the effect of an approved bankruptcy reorganization plan on the obligations of a lease guarantor. The corporate tenant, under a lease that was guaranteed by an individual styled as an "insider" of the corporation, filed for bankruptcy and eventually reorganized under a plan that claimed to be a discharge of liability of the corporation and any of its insiders. The court of appeals, however, found that since the guarantor had executed a separate guaranty making it primarily liable for the tenant's obligations under the lease, the guarantor was not discharged by the reorganization plan.[226] The bankruptcy plan affected the liability of the corporate tenant and did not affect the guarantor's primary obligation under the separate guaranty contract.[227]

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216. *Id.*

217. The Texas Deceptive Trade Practice Act is found at TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (Vernon 1987).

218. 735 S.W.2d at 605.

219. *Id.*

220. 729 S.W.2d 897 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

221. The language of the provision in question provided that "[g]eneral parking shall be in the front and on the north side of the general parking area, and there shall be no assigned parking spaces provided for any Tenant in these areas." *Id.* at 900. The lease did not define either general parking area or assigned parking spaces, and the provision had been copied from a previous lease; the court found this sufficient support that the lease was ambiguous. *Id.* at 901-02.

222. *Id.* at 902.

223. *Id.* at 903-04.

224. *Id.* at 906-07.

225. 728 S.W.2d 827 (Tex. App.—Dallas 1987, no writ).

226. *Id.* at 829.

227. *Id.* One justice dissented on the theory that the lessor had brought the action in the

In *Alzo Advertising, Inc. v. Industrial Properties Corp.*[228] the court considered the construction of a written lease agreement. A subtenant proposed to sublet a small portion of the premises in question for the purpose of erecting and maintaining a billboard. Pursuant to provisions of the lease agreement, the subtenant submitted plans and specifications for the billboard to the lessor for its approval. The lessor disapproved the plans, indicating that a billboard would not be permitted on the premises. The subtenant then instituted action seeking judgment that the provisions of the lease did not restrict erection of the billboard and that the lessor could not unreasonably withhold its approval of the plans and specifications. The trial court granted the lessor's motion for summary judgment and the subtenant contended this was improper on several grounds.[229]

On appeal, the subtenant first argued that a lessee has an unencumbered right to use property for any lawful purpose absent a restriction to the contrary, asserting that the lease provision affording to lessor the right to approve plans dealt only with the sufficiency of the plans and did not extend to the nature of the use of the property. The court disposed of this contention, holding that a lessor may put such conditions in a lease with reference to use and occupancy of the premises as it pleases.[230] The subtenant then asserted that the billboard did not constitute a structure within the meaning of the lease provision in question. The court found that a billboard constituted a structure for the purposes of the lease.[231] The subtenant also contended that the provision allowing the lessor the right to approve plans and specification was in fatal conflict with another provision of the lease. The court found that the alleged conflict simply did not exist as the other provision relied upon by the subtenant dealt with the right to construct improvements following a less than total destruction of existing improvements or destruction from causes other than fire, hail, or tornado.[232] Accordingly, the court affirmed the trial court's decision insofar as it provided that the lessor had the absolute right to refuse permission to erect a billboard on the premises.[233]

In *Ridgeline, Inc. v. Crow-Gottesman-Shafer No. 1*[234] the court dealt with the question of whether summary judgment is available if a lessor reasonably or unreasonably withholds its consent to an assignment or subletting. The

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wrong court and that the proceeding properly should have been heard in the bankruptcy court. *Id.* (Howell, J., dissenting).

228. 722 S.W.2d 524 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

229. *Id.* at 526.

230. *Id.*

231. *Id.* The court followed decisions in other states that held that billboards are structures, such as Bossier Center, Inc. v. B&B Systems, Inc., 388 So. 2d 826, 831 (La. Ct. App. 1980). The specific language in the lease required prior approval of plans and specifications for erection of any "building, structure, or other improvements". The subtenant argued for the application of the rule of *ejusdem generis*, stating that since "structure" was a more general term than "building" and followed it in the provision in question, the general term structure was limited by the preceding word building. 722 S.W.2d at 527. The court disagreed with this contention. *Id.*

232. 722 S.W.2d at 528.

233. *Id.* at 529.

234. 734 S.W.2d 114 (Tex. App.—Austin 1987, no writ).

lessor had leased premises for operation of a restaurant pursuant to a written lease providing that the lessee could not assign or transfer the lease without the lessor's prior consent, such consent not to be unreasonably withheld. The lessee then closed its business and undertook to assign the lease to a restaurant and bar featuring dance music. The lessor refused to consent to the assignment, and the lessee brought suit alleging damages and a violation of the Deceptive Trade Practice Act.[235] The lessors filed a motion for summary judgment, to which the lessees failed to respond, asserting that the assignment was to a nightclub.[236] After a hearing at which the lessees did not appear, the trial court entered summary judgment in favor of the lessor.[237] On appeal, the court reversed, finding the summary judgment was inappropriate on the grounds that the lessor had not filed summary judgment proof addressing the issue of the unreasonable withholding of consent to an assignment to a restaurant and bar featuring dance music, the lessors' motion having alleged that the proposed assignment was to a nightclub.[238] More importantly for the real estate practitioner, the court went on to say that the summary judgment also was not proper because inquiry as to reasonable conduct will almost always be a question of fact precluding summary judgment.[239] In drafting lease agreements, practitioners will therefore need to keep in mind that the issue of reasonableness of withholding consent to a lease assignment or subletting will not be a matter for summary judgment proceedings, except in extraordinary circumstances.

In *Inn of the Hills, Ltd. v. Schulgen & Kaiser*[240] the court dealt with the question of whether a lessee had given timely notice of its intention to extend a written lease. The lease agreement afforded to the lessee the right to extend the lease for successive five year periods, provided notice of extension was given at least sixty days prior to the expiration of the initial term of the lease or any extended term then in effect. The original lessee assigned the lease to a third party, but the assignee, rather amazingly, neither obtained nor reviewed a copy of the lease prior to the assignment or after. Subsequently, the original lessee inquired whether the assignee had exercised its renewal right. Since the assignee had not done so, he contacted the lessor and attempted to exercise the right orally. The assignee then mailed a letter to the lessor exercising the renewal right. The lessor received the letter approximately two weeks late. When the lessor rejected the lease renewal, the assignee sued. The trial court allowed the assignee to renew the lease, finding that the failure to timely fulfill the requirement was a result of mere neglect, that the delay was slight, and that small or no loss to the lessor had

235. *Id.* The Texas Deceptive Trade Practices Act is found at TEX. BUS. & COM. CODE ANN. §§ 17.41-.826 (Vernon 1987).

236. 734 S.W.2d at 115.

237. *Id.*

238. *Id.* at 116.

239. *Id.* (citing Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 453-54 (Tex. 1972); Easter v. Mutual of Omaha Ins. Co., 535 S.W.2d 700, 702-03 (Tex. Civ. App.—El Paso 1976, no writ)).

240. 723 S.W.2d 299 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

occurred.[241] The court of civil appeals upheld this decision, noting that while the assignee was negligent, the evidence was insufficient to establish gross negligence as a matter of law.[242]

Santos v. City of Eagle Pass[243] dealt with the necessity for a demand for performance before forfeiture of a lease. A city brought a forcible entry and detainer suit to recover two separate but adjacent tracts demised by two separate leases. Since the lessee was delinquent in rental payments on each of the leases, the city ordered him to vacate the premises. The lessee argued that a demand for performance was required before the city could lawfully terminate the lease and his rights to possession.[244] The court disagreed, finding the leases provided by their specific terms for re-entry upon failure to pay rental.[245] The city had complied with the statutory requirements concerning forcible entry and detainer, which do not require prior demand for performance unless the written lease agreement or applicable law requires the landlord to give such notice.[246]

B. Damages

In *Martinez v. Ball*[247] the court dealt with the liability of the assignor of a leasehold estate for back rent and for removal of fixtures in contravention of the lease agreement. The assignor had originally entered into the lease and then assigned its rights to another party. The assignee defaulted in payment of rent and also vacated the premises after removing some restaurant equipment. The assignors argued that they were no longer liable under the lease by virtue of their assignment and that no evidence existed to support liability for damage to the property for removal of fixtures and for the taking of the fixtures themselves. The court of appeals held that a tenant is not released from its obligation to pay rent by virtue of the fact that it has assigned the lease with the lessor's consent.[248] The court also found sufficient evidence to

241. *Id.* at 300. The trial court followed Jones v. Gibbs, 133 Tex. 627, 640-41, 130 S.W.2d 265, 272 (1939). In that case the Texas Supreme Court stated:

> In cases of mere neglect in fulfilling a condition precedent of a lease, which do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.

133 Tex. at 640-41, 130 S.W.2d at 272. When the lessor characterized the statement as dictum, the court of appeals disagreed and applied it to the case. 723 S.W.2d at 301.

242. 723 S.W.2d at 301.

243. 727 S.W.2d 126 (Tex. App.—San Antonio 1987, no writ).

244. The lessee relied on the cases of McVea v. Verkins, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ), and Shepherd v. Sorrells, 182 S.W.2d 1009, 1011 (Tex. Civ. App.—Eastland 1944, no writ).

245. 727 S.W.2d at 128.

246. *Id.* at 128 (referring to TEX. PROP. CODE ANN. §§ 24.001-.011 (Vernon Supp. 1988)).

247. 721 S.W.2d 580 (Tex. App.—Corpus Christi 1986, no writ).

248. *Id.* at 581 (citing Shooman v. McAughan, 404 S.W.2d 665, 667 (Tex. Civ. App.—Eastland 1966, no writ); Carter v. Stovall, 291 S.W.2d 411, 413 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.)). The assignors also argued that a prior eviction of their assignee constituted a permanent eviction discharging them from liability. The court found that the eviction was not a permanent deprivation of the right to occupy the premises since the assignees had subsequently brought the rent current and returned to the premises. *Id.*

support the award for removal of fixtures and resulting damages.[249]

Chapman & Cole v. Itel Container International[250] sets forth the damages recoverable on an anticipatory breach of a lease by a lessee. Lessor and lessee entered into a transaction whereby the lessor was to acquire a tract of land, build a container yard to the lessee's specifications, lease the container yard to the lessee for a period of ten years, and grant to the lessee the right to acquire the property. Although the lessee had broad experience in constructing container yards and was the entity actually responsible for design and construction of the facility, the lessee designed and constructed a container yard that was not adequate for its purposes. After some period of time, the lessee abandoned the premises and failed to make rental payments. The lessor undertook to relet the premises, and leased to several tenants who each, in turn, were unsuccessful in operations.

The federal district court, applying Texas law, found that when a lessor elects to treat a lessee's abandonment of premises as an anticipatory breach and thereafter leases the premises for a portion of the original lease term, the damages recoverable are comprised of two elements: (1) an element of damages equal to the difference, if any, between the rental reserved under the original breached lease and rental obtained from the subsequent reletting (if the subsequent reletting was for a greater rental then no damages would be recoverable under this component); and (2) as to the portion of the lease term as to which no reletting was effected, the measure of damages is the difference between the present value of the rentals reserved in the original breached lease, reduced by the reasonable cash market value for the leased premises for the unexpired term.[251] In this case, the lessor had failed to introduce evidence of the fair market cash rental value of the premises for the unexpired portion of the term, and therefore the court did not allow the lessor to recover on this particular issue.[252]

Douglas v. West Alabama, Ltd.[253] also dealt with the construction of a damage provision in a written lease. After default under the lease, the lessor brought suit against the lessee seeking recovery of damages for the time period following the tenant's default. The lease provided that the landlord could recover damages equal to the balance of the rent for the remaining term less the fair market value of the leased premises for that period. The trial court awarded damages for the period from the date of default through the end of the lease based solely on the original rental payable under the lease, impliedly finding that the premises had no fair market value.[254] The court of civil appeals reversed, finding that the only testimony introduced at

249. *Id.* The court quoted Fenlon v. Jaffee, 553 S.W.2d 422, 428 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.), for the proposition that "[a] fixture is broadly defined as something that is personal in nature but so annexed to realty as to become part of the realty." 721 S.W.2d at 581.

250. 665 F. Supp. 1283 (S.D. Tex. 1987).

251. *Id.* at 1294 (citing White v. Watkins, 385 S.W.2d 267, 270 (Tex. Civ. App.—Waco 1964, no writ)).

252. *Id.* at 1295.

253. 722 S.W.2d 736 (Tex. App.—Houston [14th Dist.] 1986, no writ).

254. *Id.* at 737.

trial concerning the fair market rental value of the premises was insufficient to support the trial court's implied conclusion, and rendered judgment that the landlord could not collect any damages for the period of time after the default because of the failure to establish the fair market rental value of the premises.[255]

Inwood North Professional Group—Phase I v. Davidow[256] explores the theories of independent covenants in leases and the requisites for proving constructive eviction. A lessor had sued a lessee for past due rent and cost of renovation after the lessee had abandoned the premises and ceased paying rent. At trial, based on jury findings, the court entered judgment in favor of the lessee for damages and relocation expenses as a result of lessor's breach of the lease.[257] The court of civil appeals reversed, noting that the well settled law of Texas is that the lessor's covenant too maintain premises and the tenant's covenant to pay rent are regarded as independent of one another unless the lease specifically provides to the contrary.[258] Accordingly, the landlord's failure to repair or maintain did not entitle the tenant to withhold rent payments.[259] In this situation the lessee could not use the lessor's breach of the lease as a defense for nonpayment of the rent.[260] The court of appeals also held that the trial court had abused its discretion by allowing a trial amendment raising the defense of constructive eviction, since this issue had not been tried by consent.[261] The court of appeals therefore reversed the judgment of the trial court and rendered judgment in favor of the lessor for lost rents and other costs.[262] In reaching its final determination the court found that the lessee's pleadings did not raise an affirmative defense of breach of warranty nor had the lessee provided authority for extending the warranty of habitability to a commercial lease.[263] In light of the supreme

255. *Id.* at 737-38. The only testimony at trial was a statement of one of the general partners of the landlord stating that they had been unable to rent the space. The court of civil appeals indicated that this testimony did not constitute evidence that the property had a fair market rental value of zero. Testimony to the effect that the space could not be relet at any price, however, might have been sufficient. *Id.*

256. 731 S.W.2d 600 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

257. *Id.* at 602.

258. *Id.*

259. *Id.* at 602-03 (citing Edwards v. Ward Assocs., Inc., 367 S.W.2d 390, 393 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App.—El Paso 1930, no writ)).

260. *Id.* at 603.

261. *Id.* at 603-04.

262. *Id.* The court also stated that the elements required for proving constructive eviction are as follows:

> (1) [A]n intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstances proven; (2) a material act by the landlord or those acting for him that substantially interferes with the use and enjoyment of the premises for the purposes for which they are let; (3) the act must permanently deprive the tenant of the use and enjoyment of the premises; and (4) the tenant must abandon the premises within a reasonable time after the commission of the act.

Id. at 603 (citing Charalambous v. Jean Lafitte Corp., 652 S.W.2d 521, 526 (Tex. App.—El Paso 1983, writ ref'd n.r.e.)).

263. *Id.* In Kammarath v. Bennett, 568 S.W.2d 658, 660-61 (Tex. 1978), the Texas Supreme Court first established the implied warranty of habitability for residential property.

court's having granted writ in this case, and its other recent holdings in the general area of implied warranties, we may see just such an extension of the habitability warranty.

C. *Duties to Occupants and Visitors*

Prestwood v. Taylor[264] provides an analysis of the duty owed by a possessor of property to a business visitor or invitee. A lessee had filed for bankruptcy and, in the bankruptcy proceeding, a trustee was appointed. The trustee, while visiting the leased premises, stepped onto a freight elevator that collapsed, causing injury to the trustee. The trustee then sued both the lessee and the owner of the premises under negligence theories. The trial court held that the trustee was a business invitee based on the findings that the owner was an occupier of the premises in question, that the owner should have known of the dangerous condition, that the owner had failed to exercise reasonable care to warn of or eliminate the risk, that the trustee was on the premises in an official capacity, and that the trustee's presence on the premises was of mutual benefit to both the trustee and the owner.[265]

The court of civil appeals, in a carefully reasoned decision, examined many authorities and found insufficient evidence to support the holding that the owner had breached any duty owed to the trustee.[266] The court noted that, in order to sustain the trial court's judgment, it must first find that the trustee was a business visitor of the owner and that the owner was a party entitled to possess the premises. Such a finding would then lead to a duty on the part of the owner to inspect the premises, discover dangerous conditions, and then either to repair those conditions or provide a warning.[267] The court first traced the history dealing with the duty owed to visitors who enter leased premises for business purposes when the premises are not generally held out for access to the public, and noted that under applicable Texas law the requirements for recovery are that the possessor's activities amount to an invitation to the injured party to enter the premises, and that a direct pecuniary benefit be expected to flow from such visit.[268] The court then turned to the question of whether the owner's status rose to that of a possessor of the premises and determined that the owner did not rise to such level since the trustee asserted that he was entitled to control of the premises by virtue of his status.[269] Even though the trustee gave the owner keys to the premises to enable the owner to show the premises to other parties, the court held that evidence was insufficient to prove the owner's possession of the

264. 728 S.W.2d 455 (Tex. App.—Austin 1987, no writ).
265. *Id.* at 457.
266. *Id.* at 465.
267. *Id.* at 457-58.
268. *Id.* at 458-59 (citing Olivier v. Snowden, 426 S.W.2d 545, 550 (Tex. 1968)). The court noted that a majority of jurisdictions in applying the business visitor theory require the same standard as to invitation as Texas, but require only business dealings, rather than a direct pecuniary benefit. 728 S.W.2d at 458-59 (citing RESTATEMENT (SECOND) OF TORTS § 332(3) (1965)).
269. 728 S.W.2d at 461.

premises.[270]

As an alternative basis for its decision, the court examined whether or not the trustee was a business invitee. The court found the evidence insufficient to support a holding that the trustee was a business invitee.[271] The court noted that in order to impart to a visitor the status of an invitee, words or conduct of the possessor must lead or encourage the visitor to believe that its entry on the premises is in some way desired by the possessor.[272] The evidence in the case indicated that the owner had never requested entry on the premises by the trustee, and indeed, supported the conclusion that the trustee was entering the premises in exercise of his duty as a bankruptcy trustee.[273] Since the trustee was a licensee and the owner did not owe him a duty of inspection, the court held that the trustee could not recover damages from the owner.[274]

Ceiling Fan Warehouse, Inc. No. 3 v. Morgan[275] also dealt with the duty owed by an occupier of premises to an invitee. A customer was injured when a display maintained in a retail store fell on him. In affirming the trial court's judgment for liability of the store, the court held that the standard of care owed by an occupier towards invitees is the ordinary care that a reasonably prudent person would exercise under the circumstances.[276] The court also considered relevant the question of whether the occupier had acted in accordance with what he knew or should have known about the risks to invitees.[277]

In *Hendricks v. Todora*[278] the court of civil appeals rejected the claims of restaurant patrons who suffered damages when a drunken driver crashed through the glass brick wall of the waiting area for the restaurant.[279] In addition to suing the driver of the car, the injured patrons also sued the owner and lessor of the property, the lessee of the property, and a related company. The court affirmed summary judgment in favor of the owner, lessee, and related company finding that, as a matter of law, the conduct of the third party driver was unforeseeable and that the defendants owed no duty to protect the patrons.[280] The court relied on the facts that the action by the third party was criminal in nature and that no prior history of this type of activity existed so as to put the owner and the lessee on notice of the potential of this type of harm.[281]

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270. *Id.*
271. *Id.*
272. *Id.* at 462-63.
273. 728 S.W.2d at 463.
274. *Id.* at 464-65.
275. 723 S.W.2d 195 (Tex. App.—Houston [1st Dist.] 1986, *modified and aff'd*, 725 S.W.2d 715, 717 (Tex. 1987)).
276. *Id.* at 197 (citing Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983)).
277. *Id.*
278. 722 S.W.2d 458 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
279. *Id.* at 465.
280. *Id.* at 459-60.
281. *Id.* at 460-63.

D. Legislation

House Bill 2481[282] amended section 91.002 of the Property Code dealing with interruption of utilities furnished to a tenant and the exclusion of a tenant, adding specific provisions dealing with commercial tenancies. Under the revision, a commercial tenant is deemed to have abandoned leased premises if goods, property, or other material are removed in an amount sufficient to indicate a probable intent to abandon.[283] The act also specifically provides that a landlord may remove and store a commercial tenant's property.[284] The act further provides that if a landlord changes the lock of a commercial tenant who is delinquent in rent, the landlord must place a notice on the tenant's front door stating the name and the address or telephone number of the party from whom a new key can be obtained.[285] A residential lease may not contain a provision waiving a right or exempting a party from a liability or duty under section 91.002, but a commercial lease may supercede the section to the extent of any conflict.[286] Unfortunately, at the same time the legislature amended section 91.002 in the manner provided in House Bill 2481, it also passed Senate Bill No. 1037,[287] which renumbered section 91.002 of the Texas Property Code as section 92.008 and moved it to chapter 92, which deals only with residential tenancies. Although it is not clear how this disparity will ultimately be dealt with, the distinction is worth noting. At the time of the codification effected by the Texas Property Code, the provisions of old article 5236c dealing with interruption of utilities to, and exclusions of, residential tenants were placed in chapter 91 of the Property Code, which is applicable to landlords and tenants generally, when they properly should have been placed in chapter 92. Under the two bills passed by this legislature, rather incongruously, section 91.002 has been moved to chapter 92 thereby limiting its effect to residential tenancies only, but under the amendment effected by House Bill No. 2481, the statute will have provisions dealing specifically with commercial tenancies.

VIII. MORTGAGES

A. Mortgages Generally

Allied Bank v. Plaza deVille Associates[288] dealt with the obligations of a construction lender to properly administer its construction loan. The owners of two apartment projects and certain mechanic's and materialmen's lien claimants brought suit against a construction lender alleging they were entitled to damages and subordination of liens arising out of the lender's admin-

282. Act of June 19, 1987, ch. 826, § 1, 1987 Tex. Sess. Law Serv. 5733 (Vernon) (codified at TEX. PROP. CODE ANN. § 91.002 (Vernon Supp. 1988)). *See infra* note 287.
283. 1987 Tex. Sess. Law Serv. at 5733.
284. *Id.*
285. *Id.*
286. *Id.*
287. Act of June 18, 1987, ch. 683, § 2, 1987 Tex. Sess. Law Serv. 5078 (Vernon) (codified at TEX. PROP. CODE ANN. § 92.008 (Vernon Supp. 1988)).
288. 733 S.W.2d 566 (Tex. App.—San Antonio 1987, no writ).

istration of the construction loans for the apartment projects. The construction lender had entered into loan agreements with a developer who, concurrently with the extension of the construction loans, had sold the projects to two syndicated limited partnerships, the developer being obligated to complete construction of the projects, to pay cash flow from the projects, and to perform certain other acts. The developer apparently completed the first project satisfactorily but defaulted on the second project. When the construction lender posted for foreclosure, the owners and lien claimants sued the lender. After a jury trial, the trial court rather astonishingly entered judgment against the construction lender for actual and exemplary damages based on causes of action for fraud and negligence and ordered an equitable subordination of the construction lender's liens to those of the mechanic's lien claimants.[289]

The court of civil appeals first addressed the question of whether the construction lender had any liability to the apartment purchasers or to the mechanic's lien claimants under the relevant construction loan documentation. The court first stated that its duty was to construe written documents in accordance with their terms and not to resort to extrinsic evidence unless there are ambiguities inherent in the documents.[290] The court noted that the loan documents were between the construction lender and the developer, and that, although the construction loan agreements set out detailed requirements specifying the prerequisites to disbursements of funds as is typical, each document also provided that the construction lender could waive these provisions and also expressly provided that the conditions to advancing funds were for the sole benefit of the lender and were not to benefit any third person.[291] In light of these specific rights and disclaimers of liability, the court found that the apartment owners might have a claim against the lender only if the lender was a surety to the developer's obligations.[292] The court noted that a specific agreement entered into between the construction lender and the owners negated any obligation on the part of the owners for liability in respect of the construction loans.[293] Accordingly, the court found that the construction lender could not be liable for fraud to the owners since the owners had no right to rely on the construction loan agreements, that the lender had no liability for breach of contract since the lender had complied with the specific provisions of the loan agreement, and finally that the construction lender was not negligent because the lender owed no duty to the apartment owners for distribution of loan proceeds.[294]

The court next turned to that portion of the trial court's judgment subordinating the construction lender's liens to those of the mechanic's lien claim-

289. *Id.* at 568.

290. *Id.* at 569 (citing Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).

291. *Id.* at 570. Evidently the construction lender disbursed all of the loans proceeds without retaining 10% and without requiring evidence that all materials and labor for construction had been paid for. *Id.*

292. *Id.* at 571.

293. *Id.*

294. *Id.*

ants on a theory of equitable subordination. The court reversed the trial court's judgment, finding no inequitable conduct on the part of the construction lender, since the lender fulfilled its obligations in accordance with its loan documentation.[295]

The court next turned to the construction lender's claim for rentals received by the apartment owners following default on the construction loan. The court found that the lender was entitled to recover these amounts in light of its prior lien on rents and specific language in the agreement between the apartment owners and the lender recognizing that the owners' rights were subordinate to those of the construction lender.[296] Accordingly, the court entered judgment in favor of the construction lender as against the claims of the apartment owners and mechanic's lien claimants and in favor of the lender for recovery of the rentals.[297]

The court reviewed the enforceability of a deed of trust that had been notarized by the trustee named in the deed of trust in *Denson v. First Bank & Trust*.[298] The mortgagors sought to enjoin a foreclosure sale, alleging that the deed of trust was void or voidable because the trustee named in the deed of trust had taken the acknowledgment on the deed of trust. The court rejected this argument, stating that the purpose of the acknowledgment is for recording, that is, to impart notice to third parties, and that neither acknowledgment nor recordation is required to make a valid, binding obligation or conveyance between the parties to the instrument.[299]

Swiss Avenue Bank v. Slivka[300] dealt with the recovery of attorney's fees under provisions contained in promissory notes secured by deeds of trust. The debtor had defaulted under two notes and deeds of trust. In an earlier suit, after the bank had accelerated maturity of the notes and posted for foreclosure, the borrower sued to enjoin the foreclosure sales. In that proceeding, the bank answered and sought attorney's fees. The court denied both the injunctive relief sought by the debtor and the bank's claim for attorney's fees since the bank was not suing to collect the notes, but was rather defending the injunctive action.[301] Immediately following the judgment denying injunctive relief, the bank again reposted for foreclosure, sending a

295. *Id.*
296. *Id.* at 572-73.
297. *Id.* at 573.
298. 728 S.W.2d 876 (Tex. App.—Beaumont 1987, no writ).
299. *Id.* at 877 (citing Drake v. McGalin, 626 S.W.2d 786, 788 (Tex. App.—Beaumont 1981, no writ); Steed v. Crossland, 252 S.W.2d 784, 787 (Tex. Civ. App.—Beaumont 1952, writ ref'd); and Shaw v. Jackson, 227 S.W. 520, 522 (Tex. Civ. App.—Beaumont 1920, no writ)).
300. 724 S.W.2d 394 (Tex. App.—Dallas 1986, no writ).
301. Slivka v. Swiss Ave. Bank, 653 S.W.2d 939, 943 (Tex. App.—Dallas 1983, no writ). The provisions of the notes in question read as follows:

> In the event default is made in the prompt payment of this note when due or declared due, and the same is placed in the hands of an attorney for collection, or suit is brought on same, or the same is collected through any judicial proceedings whatever, then the makers hereof agree and promise to pay ten per centum (10%) additional on the amount of the principal and interest then owing as attorneys' fees.

724 S.W.2d at 395.

demand letter to the debtor that claimed ten percent of the outstanding principal and interest as attorney's fees. At trial, the court held that the amount claimed for attorney's fees was unreasonable since the only service rendered by the bank's attorneys subsequent to the first suit was, evidently, drafting the new demand letter.[302] The bank asserted that the fees sought were reasonable for defending the prior injunctive suit and that it was entitled to recovery the fees under the terms of the notes. The court of civil appeals held in favor the bank, first finding that the doctrine of *res judicata* potentially arising from the first case did not bar the bank's action,[303] and then finding that the bank could recover under the contractual provisions of the notes as a part of the bank's overall collection efforts.[304]

In *Glen Ridge I Condominiums Ltd. v. Federal Savings & Loan Insurance Corp.*[305] the Federal Savings and Loan Insurance Corporation (FSLIC) had acted as a receiver of a federally insured savings and loan association. A mortgagor of that savings and loan attempted to enjoin FSLIC from foreclosing certain deeds of trust liens on condominium projects. At trial the court dismissed the mortgagor's suit seeking to enjoin foreclosure asserting that the mortgagor lacked jurisdiction over FSLIC in its capacity as receiver.[306] After a lengthy analysis, the court of civil appeals reversed the trial court's decision and remanded for trial the state law causes of action raised by the mortgagors.[307] Although the discussion on constitutional issues is beyond the scope of this article, it is important to note that the court held that FSLIC, when it is serving as a receiver and is attempting to enforce rights of the predecessor association, may be subject to local judicial determination of a borrower's defenses in the same manner as other lenders. FSLIC argued that any claims of the mortgagors, such as usury or other irregularities in administration or granting of loans had to be dealt with in administrative proceedings while it, under its powers to liquidate failed associations, could proceed to collect assets (i.e., foreclose on the deed of trust liens) and liquidate the collateral for the benefit of depositors. Attorneys dealing with federally insured lenders are referred to this case for its reasoning, since this area is sure to develop more fully over the coming year.[308]

B. Usury

El Paso Development Co. v. Berryman[309] dealt with the propriety of en-

302. 724 S.W.2d at 395-96.

303. *Id.* at 396.

304. *Id.* at 397-98 (citing RepublicBank Dallas v. Shook, 653 S.W.2d 278, 282 (Tex. 1983)).

305. 734 S.W.2d 374 (Tex. App.—Dallas 1986, no writ).

306. *Id.* at 376. The trial court relied upon 12 U.S.C.A. § 1464(d)(6)(C) (West 1980). 734 S.W.2d at 376.

307. 734 S.W.2d at 387.

308. *See also* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455-56 (1942) (since FDIC is a federal corporation, it may sue in federal district court to collect debts). *But see* North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1103 (5th Cir. 1985) (mortgagor must challenge FSLIC's action before the Federal Home Loan Bank Board prior to seeking judicial review), *cert. denied*, 474 U.S. 1054 (1986).

309. 729 S.W.2d 883 (Tex. App.—Corpus Christi 1987, no writ).

joining a foreclosure sale in the face of a claim of usury. The mortgagor had contracted to acquire certain property from the mortgagee on a cash basis but was unable to fulfill that contract. A few months later the parties entered into a new contract that provided for a credit sale at a higher purchase price with eight percent interest per annum accruing on the new note. Subsequently, the mortgagor filed suit for usury, alleging that the increase in purchase price for the credit sale as compared to the cash sale constituted interest, that the total amount of interest charged in connection with the transaction was usurious, and that both principal and interest should be forfeited because the amount of interest charged was double the amount allowed by law. The mortgagee then sought to foreclose its liens, but the trial court enjoined him from doing so. On appeal the mortgagee argued that the mortgagor was not entitled to equitable relief because the mortgagor had not done equity because it had not tendered payment of the debt. The court of civil appeals rejected this argument, noting that the cases relied upon by the mortgagor were cases in which the parties did not dispute the legality of the debt in question.[310] The court then reviewed the law pertaining to time price differentials and, while noting that a true time price differential is not interest and is therefore not subject to the usury laws, nonetheless found that the mortgagor had established a sufficient probability of recovery to support the trial court's discretionary granting of injunctive relief.[311] The court also found that, although the mortgagor had a remedy at law for damages, such a remedy would be inadequate given the uniqueness of every tract of real estate.[312] Finally, the court found that an injunction bond in the amount of $15,000 was sufficient even though the outstanding balance of the note was in excess of $7,000,000 since the mortgaged property was worth more than the amount of the debt and the trial court had not enjoined the accrual of interest on the note.[313]

The harsh results that can arise from a charge of usurious interest are clearly illustrated in *Danziger v. San Jacinto Savings Association*.[314] The borrowers entered into a contract for a home improvement loan providing for add on interest as permitted by statute.[315] The contract provided that the entire principal amount of the loan would be advanced and placed in escrow, and then funds would be disbursed to the contractor doing the home improvement work as the work progressed. The lender charged interest on the entire principal amount of the loan from the time of advance. At the end of the disbursement period, the lender calculated how much money had been held in the escrow account during each payment period and credited the borrowers for interest charged on the funds held in escrow prior to the time that the funds had been disbursed to the contractor.

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310. *Id.* at 885.

311. *Id.* at 886-87.

312. *Id.* at 888 (citing Irving Bank & Trust Co. v. Second Land Corp., 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.)).

313. *Id.* at 888-89.

314. 732 S.W.2d 300 (Tex. 1987).

315. TEX. REV. CIV. STAT. ANN. art. 5069-5.02 (Vernon 1987).

The Texas Supreme Court first addressed the practice of charging interest on the entire amount advanced and then providing a subsequent credit. The court expressly held that this practice constituted an unlawful charge of usurious interest, which could not be cured by the subsequent crediting procedure.[316] The supreme court next addressed the assertion of the borrowers that if the court found that the lenders had charged usurious interest, then the court must necessarily find that the lender had charged double the lawful rate, since the lender made no disbursements to the contractor until some time after the initial advance of funds into the escrow account, the effect then being that the lender charged interest on a loan whose outstanding principal balance was zero.[317] The court rejected this argument stating that calculating the amount of interest charged requires looking to the full term of the note and spreading the interest charged over the entire term to determine the extent of the usurious overcharge.[318] Applying this formula, the court found that the interest charged did not exceed twice the legal rate of interest.[319]

The court next addressed whether a verbal statement of the amount required to pay the loan in full constituted a charge of interest for the purpose of the usury statutes. After reviewing a variety of authorities concerning the matter, the court held that a payoff quote that reflects an interest charge in excess of that allowed by the statutes, constitutes a charge of interest.[320] The court held that the lender had charged double usurious interest when it made the payoff quote to the borrower, even though the borrower had no intention of paying off the loan early.[321] In reaching this holding the court specifically reserved the issue of whether a lender may accrue interest on an escrow account in a usury context.[322]

In addition to the statutory causes of action, the borrowers also asserted a common law claim for return of all interest paid and cancellation of future interest. The court held that the borrowers had properly pleaded the common law claim, had preserved it on appeal, and were therefore entitled to recover interest paid.[323] Finally, the court addressed the question of whether the lender's disclosures violated the Federal Truth-in-Lending

316. 732 S.W.2d at 302. The court noted that the legislature had provided for a credit of interest only in the case of a prepayment. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon 1987).

317. 732 S.W.2d at 303.

318. *Id.* (citing Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 781 (Tex. 1977)). The relevant statute setting forth the penalty for charging double the amount of lawful interest is TEX. REV. CIV. STAT. ANN. art. 5069-8.01 (Vernon 1987).

319. 732 S.W.2d at 303.

320. *Id.* at 304 (citing Wright Way Spraying Serv. v. Butler, 690 S.W.2d 897, 898 (Tex. 1985) (monthly statements may constitute charge of interest); Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260, 261 (Tex. 1977) (entry on statement of account); Dryden v. City Nat'l Bank, 666 S.W.2d 213, 216 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (demand letters); Moore v. Sabine Nat'l Bank, 527 S.W.2d 209, 213 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (affidavits and pleadings)).

321. *Id.* at 303-04.

322. *Id.* at 304.

323. *Id.*

Act,[324] found that the lender's oral disclosures did not substantially comply with the act's requirements, noted that even a technical violation of this act imposes liability, and held that the borrowers could recover an additional penalty thereunder.[325]

Accordingly, the supreme court reversed the judgments of the lower courts and rendered judgment in favor of the borrowers for recovery of double the amount of interest contracted for, recovery of all interest paid under the common law theory, and the statutory penalty provided for under the Federal Truth-in-Lending Act.[326] Justice Gonzales, in a concurring opinion, agreed with the court but characterized as dictum that part of the majority opinion indicating that statements in pleadings can constitute a charge of interest, stating that, in his view, the court had not yet directly addressed that issue.[327] This case can be put in perspective by noting that, although the lender overcharged the buyer only $1,172.62 in interest, this overcharge entitled the borrowers to recover double the amount of interest contracted for, an amount of $94,434.80, plus all interest actually paid and a $2,000 penalty under the applicable federal law, as well as reasonable attorneys' fees.[328] The court remanded the case to allocate the payments between principal and interest and to determine reasonable attorneys' fees.[329]

In *Coppedge v. Colonial Savings & Loan Association*[330] a Texas court also dealt with the charging of usurious interest, this time in connection with a home loan secured by a deed of trust. The owners had contracted to sell their house and in closing the transaction prepaid an outstanding loan. The lender, however, notified the title company handling the transaction to withhold an additional sum of money, apparently based upon a claim of violation of the due on sale provisions in the deed of trust; the amount claimed was held in escrow by the title company. Subsequently, an attorney for the

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324. Consumer Credit Protection Act, 15 U.S.C. § 1601 (1982).

325. 732 S.W.2d at 304-05. The Truth-in-Lending Act requires that the lender give the borrower clear and conspicuous information in every consumer credit transaction. 15 U.S.C. § 1631 (1982). The annual percentage rate and the finance charge must "be disclosed more conspicuously than other terms." *Id.* § 1632. The creditor must disclose the following information:

(1) the amount financed,
(2) the total finance charge in dollars,
(3) the annual percentage rate,
(4) the number and dates of payment,
(5) the total sales price, which includes the total finance charge,
(6) definitions of terms used, such as annual percentage rate,
(7) statement on any security interest,
(8) any late payment charge,
(9) any consumer rebate of finance charge applicable,
(10) statement that consumer should read the terms of the document attached,
(11) "in any residential mortgage transaction, a statement indicating whether a subsequent purchaser or assignee . . . may assume the debt obligation."

Id. § 1638.

326. 732 S.W.2d at 305.

327. *Id.* (Gonzales, J., concurring).

328. *Id.*

329. *Id.*

330. 721 S.W.2d 933 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

lender sent the owner a letter demanding payment of the amount in question, characterizing it as back interest, and demanding attorney's fees. The title company then delivered the funds to the lender based on its claim. Approximately eight months later the lenders returned the amount in question, with interest, to the owners. The owners then sued the lenders for usury.

The court first dealt with the issue of whether the amount in question constituted interest, since the loan had been paid in full. The court found that since the lender claimed the sum in question as additional compensation for the use of money the amount constituted interest, and that the payment in full of the loan did not change the nature of the sum as compensation for the use of money.[331] The court also found that the lender had both charged and received the usurious interest, the charge occurring when the demand letter was sent and the receipt having occurred when the amount was collected from the title company.[332] The lender then raised the statutory provisions dealing with the spreading of interest and refunding of payments as a defense to the usury penalties.[333] The court, however, found that the lender had charged the borrower excess interest and that the lender was not entitled to the benefits of the refund provisions of the statute.[334] The court held that the refund provision was intended to allow lenders to avoid usury penalties when they have inadvertently received usurious interest by virtue of a prepayment by a borrower, and that the provision was not available to a lender who had, by its own actions, demanded, charged, and received usurious interest.[335] The court therefore assessed the statutory penalties for usury against the lender.[336]

Benser v. Independence Bank[337] dealt with whether a junior lienholder may seek to have a prior lien declared void for usury. The holders of a note secured by a junior lien on real property brought suit seeking a declaratory judgment that a senior note and deed of trust were void because of usury. The junior lienholder alleged that a sum of money that a prior owner had paid for the renewal and extension of the senior lien indebtedness constituted interest such that the aggregate interest charged was in excess of the lawful rate. The senior lienholders alleged that the sum was paid as consideration

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331. *Id.* at 936.

332. *Id.*

333. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon 1987), which provides, in part:

> [T]he lender contracting for, charging, or receiving all such interest shall refund to the borrower the amount of the excess or shall credit the amount of the excess against amounts owing under the loan and shall not be subject to any of the penalties provided by law for contracting for, charging, or receiving interest in excess of the maximum lawful rate.

334. 721 S.W.2d at 938. The refund provision applies only when the buyer pays off the loan early and is entitled to a refund of interest. TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon 1987).

335. 721 S.W.2d at 938.

336. *Id.* The court also dealt with the question of whether or not the homeowners had a common law usury claim. The court found that the common law claim did exist, but did not entitle the homeowners to any relief beyond that to which they were entitled under the statutory provisions. This holding should be compared with the Texas Supreme Court's holding in *Danziger*, 732 S.W.2d at 304.

337. 735 S.W.2d 566 (Tex. App.—Dallas 1987, no writ).

for termination of foreclosure proceedings and did not constitute interest. The majority of the court of civil appeals assumed for purposes of the opinion that the sum of money paid was interest and that a usurious transaction had occurred, and proceeded to determine the relative rights of the parties in light of the assumption.[338]

The court analyzed the relevant statutes and case law and held that a claim of usury is personal to the debtor or obligor and that a junior lienholder, not being obligated to pay the indebtedness in question, has no standing to assert the usury claim.[339] The court distinguished the cases relied upon by the junior lienholders, noting that those cases had been decided under a previous codification of the usury statutes that declared usurious contracts void, while the current statutory provisions dealing with the penalties for usury clearly state that the penalties are payable only to the obligor.[340] The court stated that even though under current Texas law a usurious contract is void, a junior lienholder nonetheless has no standing to raise the usurious nature of a note secured by a prior lien.[341]

One justice concurred in the result but expressly disagreed with the court's reasoning.[342] Justice LaGarde would have held that a junior lienholder has a sufficient justiciable interest and standing to raise the question of whether indebtedness secured by a prior lien would be void for usury, since this would in turn render the lien void and, thus directly affect the junior lienholder's rights.[343] The justice concurred with the reasoning that the monetary penalties provided for by the usury statutes would not be collectible by a junior lienholder in light of their specific language, but did not find this dispositive of the issue of whether a junior lienholder has standing to assert that a prior lien is void because of usury.[344]

C. *Foreclosure and Injunction*

In *Jasper Federal Savings & Loan Association v. Reddell*[345] the supreme court dealt with the duty to comply with specific contractual notice provisions contained in a deed of trust prior to foreclosure. After default in payment of their loan, the mortgagors received a notice from counsel for the

338. *Id.* at 568.

339. *Id.* (citing Houston Sash & Door Co. v. Heaner, 577 S.W.2d 217, 222 (Tex. 1979); Micrea, Inc. v. Eureka Life Ins. Co. of America, 534 S.W.2d 348, 354 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. § 5069-1.06 (Vernon 1987)).

340. *Id.* at 568-69. The junior lienholders relied upon Maloney v. Eaheart, 81 Tex. 281, 284, 16 S.W. 1030, 1031 (1891), and Johnson v. Lasker Real Estate Ass'n, 21 S.W. 961, 962 (Tex. Civ. App.—Galveston 1893). The current usury penalty statute relied upon by the court is TEX. REV. CIV. STAT. ANN. § 5069-1.06(1) (Vernon 1987).

341. 735 S.W.2d at 569.

342. *Id.* at 570-71 (LaGarde, J., concurring).

343. *Id.* at 572-73.

344. *Id.* at 574. Justice LaGarde concurred in the result because he characterized the payment made in connection with the renewal and extension of the prior lien indebtedness as having been made under an agreement separate from the original note and deed of trust. Even if the separate renewal agreement were void for usury, therefore, the previously existing note and deed of trust would not be void. *Id.*

345. 730 S.W.2d 672 (Tex. 1987).

lender indicating that their loan was past due, that they could avoid foreclosure proceedings by paying the delinquency and accrued costs, and that, if the delinquency was not cured, the lender would foreclose. The specific contractual provisions of the deed of trust, however, also required that the lender give the mortgagors notice of their right to reinstate after acceleration and of the right to bring a court action to assert the non-existence of a default or to raise any other defense the mortgagors might have. The notice the lender gave to the mortgagors did not inform them of their reinstatement right or of their right to assert legal defenses. The mortgagors did not cure the default, their indebtedness was accelerated, and the property was posted for foreclosure. The notices given in connection with the acceleration and posting complied with the relevant statutory provisions. After the foreclosure sale, the mortgagor brought suit for wrongful foreclosure, relying upon the deficiencies in the original notice.

The trial court held that the mortgagors were estopped from complaining of the deficiencies in the original notice because they had actual notice of their reinstatement rights and their right to assert defenses by virtue of having consulted with counsel.[346] The court of appeals reversed, holding that strict compliance with the terms of the deed of trust was required.[347] The supreme court, reversing the court of appeals and upholding the trial court, held that, although strict compliance with legal notice requirements is required in order to conduct a foreclosure sale, the provisions of the deed of trust providing for additional notice constituted a contractual obligation between the mortgagor and mortgagee, and actual notice of the rights in question sufficiently complied with Texas law respecting notice prior to acceleration of maturity and foreclosure of liens.[348]

Intertex, Inc. v. Cowden[349] presented interesting questions about proper procedures in conducting a foreclosure sale. The trustee under a deed of trust had posted for foreclosure and was instructed to sell the property in question at a public, nonjudicial foreclosure sale. Because of a pending insurance claim, however, the trustee became concerned about the proper amount to bid at the foreclosure on behalf of the mortgagee. If the insurance claim was not properly accounted for, the trustee would perhaps be auctioning the property for less than the total debt and would not be selling the property for the highest offer. The trustee attempted to contact the mortgagee to discuss this issue on the day of foreclosure but was unsuccessful, and at sale ultimately bid in an amount in excess of that authorized by the mort-

346. *Id.* at 674.

347. Reddell v. Jasper Fed. Sav. & Loan Ass'n, 722 S.W.2d 551, 553-54 (Tex. App.—Beaumont), *rev'd*, 730 S.W.2d 672 (Tex. 1987). The court of appeals felt bound by the holdings in Houston First Am. Sav. v. Musik, 650 S.W.2d 764, 768 (Tex. 1983) (trustee must comply with notice provision in deed of trust) and Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232, 234 (Tex. 1982) (mortgagee failed to give adequate notice to mortgagor under the deed of trust). The supreme court found that these cases, which delineate the requirements for notice prior to acceleration of maturity and posting for foreclosure, were not applicable to the contractual notice in issue in this case. 730 S.W.2d at 674.

348. 730 S.W.2d at 675.

349. 728 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1986, no writ).

gagee. On the next day the mortgagee refused to ratify the unauthorized bid and the property was subsequently reposted for sale in the following month. The party offering the second highest bid at the initial sale, however, upon finding that the mortgagee's bid had not been ratified, brought suit for declaratory judgment that it was entitled to the property by virtue of the bid made at the first foreclosure sale.

The second highest bidder's first argument was that the mortgagee could not be the highest bidder because the bid was unauthorized and because the mortgagee failed to credit the bid against its note within a reasonable period of time. The court rejected this argument, pointing out that the mortgagee could have ratified the bid and stating that the reasonable time limitation imposed on cash bidders at foreclosure sales did not appear to be applicable to mortgagees bidding for credit against their own notes.[350] The second highest bidder also argued that the trustee was required to sell the property to him rather than reposting the property for sale, but the court rejected this argument as well since the mortgagee's disaffirmance of the trustee's bid was not discovered until the next day and therefore reconvening the sale would have been impossible; reposting the property was the proper procedure.[351] Finally, the second highest bidder argued that a foreclosure sale is similar to an auction transaction and that, under the rules applicable to auctions, a bid for cash is an offer and a contract is created upon the making of the highest bid. The court also rejected this argument, finding that the appellant was not the highest bidder for cash and that no contract had ever been created.[352] Accordingly, the court of appeals upheld the trial court's decision in favor of the mortgagee.[353]

Lamar Savings Association v. White[354] illustrates some of the procedural machinations that some debtors will undertake in these times to avoid a foreclosure. A lender filed suit in Travis County, Texas, alleging default in payment of certain promissory notes, and thereafter posted the properties securing payment of the notes for foreclosure. One of the debtors involved then filed suit in Harris County, alleging breach of contract, breach of fiduciary duty, usury, and other defenses arising out of an alleged failure to extend maturity of one of the promissory notes that was the subject of the Travis County suit. The lender then filed a plea in abatement as to the Harris

350. *Id.* at 816 (citing Habitat, Inc. v. McKanna, 523 S.W.2d 787, 790 (Tex. Civ. App.—Eastland 1974, no writ)).

351. *Id.* at 816-17 (citing Mitchell v. Texas Commerce Bank, 680 S.W.2d 681, 683 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (a reconvened foreclosure sale held after the original high bidder was unable to obtain necessary funds was invalid because bidders had dispersed; sale required reposting); Kirkman v. Amarillo Sav. Ass'n, 483 S.W.2d 302, 309 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (upholding a reconvened foreclosure sale when all the bidders had regathered after the original high bidder was unable to meet his offer price); Clearman v. Graham, 4 S.W.2d 581, 582-83 (Tex. Civ. App.—Austin 1928, writ dism'd) (finding that a second sale was invalid when the original high bidder was unable to meet his cash bid and the bidders at the first sale had dispersed; accordingly, the property should have been readvertised for bid)).

352. *Id.* at 818.

353. *Id.* at 820.

354. 731 S.W.2d 715 (Tex. App.—Houston [1st Dist.] 1987, no writ).

County action, alleging that dominant jurisdiction in the case resided with the Travis County court. The Harris County court denied the plea and issued a temporary injunction prohibiting the lender from taking steps to foreclose its liens and from taking further action in any other court in respect of the indebtedness.[355]

The court of civil appeals first noted that the court in which a suit is first filed acquires dominant jurisdiction over that case and its subject matter.[356] The court then addressed the allegation of the debtor that it had not been served with citation and, from the record, found that the lender had diligently tried to obtain service of process and was stopped from doing so by the injunctive relief issued in Harris County.[357] Having found that the lender had sought to prosecute the suit in Travis County in good faith, the court then turned to the allegations of the borrower that the subject matter of the Harris County suit was separate and distinct from the proceedings brought in Travis County. The court had little difficulty finding that the debtor's claims arose out of a note that was the subject matter of the suit brought in Travis County and also disagreed with the debtor's argument that seeking restraint of foreclosure proceedings was a basis for a separate action.[358] The court therefore held that the Travis County court had jurisdiction.[359]

Anderson Oaks v. Anderson Mill Oaks[360] dealt with the necessary showing required to support the granting of a temporary injunction prohibiting a foreclosure sale. The purchaser of two apartment projects, after acquisition, discovered construction defects and requested the prior owners to remedy the same. The prior owners undertook to do so, but a dispute arose as to whether the prior owners had properly done the repair work. When the purchaser failed to make payments on a purchase money indebtedness secured by deed of trust encumbering the projects, the prior owners posted their liens for foreclosure. The purchaser then filed suit, alleging breach of contract and other matters. The purchaser also sought injunctive relief prohibiting foreclosure of the liens, which the trial court denied.[361]

The court of civil appeals reversed, finding that the trial court had abused its discretion in denying injunctive relief.[362] In so holding, the court first noted that the granting of injunctive relief requires a showing of probable irreparable injury and a probable right of recovery on the merits.[363] Since the record on appeal did not contain a statement of facts or conclusions of law on the injunction issue, the court assumed that the trial court had found

355. *Id.* at 716.
356. *Id.* (citing Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974)).
357. *Id.* at 717.
358. *Id.* at 717-18.
359. *Id.*
360. 734 S.W.2d 42 (Tex. App.—Austin 1987, no writ).
361. *Id.* at 43.
362. *Id.* at 43-44.
363. *Id.* at 43 (citing Transport Co. v. Robertson Transps., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953)).

adversely to the purchaser on both issues.[364] The court first noted that in a case in which a foreclosure sale would deprive the party seeking injunctive relief of possession and use of the property, as a foreclosure sale always will, the party's legal remedy is inadequate as a matter of law.[365] The court then reviewed at length the allegations concerning construction defects, and in light of the rather scanty record, and balancing the equities, found the trial court had abused its discretion by failing to enjoin the foreclosure, since the purchaser would lose its property interest, while the prior owners would only experience delay in foreclosing their liens.[366] Accordingly, the court reversed the order of the trial court and remanded the case for issuance of a temporary injunction after fixing the amount of the injunction bond.[367]

The court addressed the propriety of temporarily enjoining a foreclosure sale in *Guardian Savings & Loan Association v. Williams*,[368] which contains interesting language for the real estate lawyer as to the showing of irreparable injury required in these cases. A real estate developer sought to enjoin a foreclosure sale, alleging usury.[369] Interestingly, the appellate court upheld the trial court's determination that the developer would not be compensable in money for damages suffered if foreclosure occurred.[370] The developer alleged that the sale would deprive him of the ability to develop the property and thereby achieve its full benefit. At trial the developer testified that a foreclosure would be injurious to his reputation and would impair his ability to borrow money from other financial institutions. The court of civil appeals, finding this evidence sufficient to support the injunctive relief, noted that every piece of real estate is unique, that this particular property was strategically located for development purposes, and that the developer did in fact plan to develop the property.[371] It is instructive to compare the sort of analysis as to irreparable injury set forth in this case with the rather perfunctory statement in *Anderson Oaks*.[372]

Texas American Bank/West Side v. Haven[373] dealt with the power of a receiver appointed in a divorce proceeding to enjoin a foreclosure sale. A receiver had been appointed in a divorce proceeding and was empowered to sell the parties' house. Some time after the divorce was granted, the bank holding a mortgage secured by the house commenced foreclosure proceed-

364. *Id.*

365. *Id.* at 43-44 (citing Sumner v. Crawford, 91 Tex. 129, 132, 41 S.W. 994, 996 (1897)).

366. *Id.* at 45.

367. *Id.* at 46.

368. 731 S.W.2d 107 (Tex. App.—Houston [1st Dist.] 1987, no writ).

369. Apparently the transaction involved the situation in which the developer and the lender were also joint venture partners, with the lender loaning money to the joint venture in question.

370. 731 S.W.2d at 109.

371. *Id.* The court distinguished its previous holding in Ginther-Davis v. Houston Nat'l Bank, 600 S.W.2d 856, 865 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.), because, in that case, the party seeking the injunction alleged that the real estate was unique, but did not specify why. Furthermore, their objective was to sell the property, and they presented no evidence why they could not be compensated in monetary damages. 731 S.W.2d at 109.

372. *See supra* notes 360-67 and accompanying text.

373. 728 S.W.2d 102 (Tex. App.—Fort Worth 1987, no writ).

ings, the receiver sought injunctive relief. The trial court enjoined the bank from foreclosure for a period of approximately six months, ordered that interest payments be made during that time period, and also required the receiver to post a bond.[374] On appeal, the bank argued that the effect of the injunction was to elevate the family law court to the status of a bankruptcy court, without the accompanying statutory protections. The court of appeals noted that well settled law provides that property in the possession of a receiver is not subject to a foreclosure sale unless the court in which the receivership is pending so approves.[375] The court noted that such provision does not alter the lien rights but merely suspends enforcement until the court having custody of the property authorizes the enforcement.[376] The court also noted that its power on appeal was limited to review of the granting of the temporary junction to see if it was a clear abuse of discretion.[377] The court found no clear abuse of discretion in this case in light of the requirement that there be monthly interest payments, and presumably also because of the requirement for a bond and the relatively short delay, although these points were not expressly noted.[378]

D. Legislation

House Bill 1504[379] amends section 51.002 of the Texas Property Code in several important respects. The act requires the commissioners courts to designate the area at the county courthouse where foreclosure sales are to occur and to record such designations in the county real property records.[380] Sales must occur in the designated area, or, if the commissioners court fails to designate an area, then the notice of sale posted must designate the area where the sale will take place.[381] Notices of sale must also include a statement of the earliest time at which the sale will occur and the sale must begin no later than three hours after that time.[382] The statute requires lienholders to give written notice of default by certified mail to debtors for liens on property used as the debtor's residence.[383] The statute also provides for twenty days opportunity to cure a default before acceleration of maturity of the debt or the giving of notice of sale.[384] Presumably, the legislature intends this provision to apply only to residential mortgages. The language of the statute, however, is less than clear and it can, with some stretching, be interpreted such that the twenty day notice provision is applicable to all

374. *Id.* at 103.
375. *Id.* at 104 (citing First S. Properties, Inc. v. Vallone, 533 S.W.2d 339, 341 (Tex. 1976); Cushing v. B.C. Evans Co., 33 S.W. 703, 704 (Tex. Civ. App.—1895, writ ref'd)).
376. *Id.* at 104-05.
377. *Id.* at 105.
378. *Id.*
379. Act of June 17, 1987, ch. 540, § 1, 1987 Tex. Sess. Law Serv. 4338 (Vernon) (codified at TEX. PROP. CODE ANN. § 51.002 (Vernon Supp. 1988)).
380. *Id.* § 1(a), 1987 Tex. Sess. Law Serv. at 4338.
381. *Id.*
382. *Id.* § 1(b)-(c), 1987 Tex. Sess. Law Serv. at 4338-39.
383. *Id.* § 1(d), 1987 Tex. Sess. Law Serv. at 4339.
384. *Id.*

mortgages rather than only to residential mortgages.[385] Unfortunately, the legislature did not make clear in its drafting exactly what was intended, although this author believes that a fair reading of this provision and its short legislative history suggests that the twenty day notice provision was meant to be applicable only to mortgages encumbering property used as the debtor's residence.

IX. MECHANIC'S AND OTHER LIENS

A. Mechanic's Liens

McCoy v. Nelson Utility Services, Inc.[386] dealt with the rights of competing claimants to funds retained under a construction contract. The owner of a subdivision had contracted with a general contractor for the installation of a sewer, a water system, and streets. The contractor, in turn, ordered materials from a materialman to complete its contract. When the owner and contractor disputed the performance of the work, litigation ensued. The materialman intervened in the lawsuit presenting its claim for damages. The materialman raised the issue that is germane to mechanic's and materialman's lien law, namely, whether materialmen have the right to the retainage that owners withhold from progress payments made to contractors under the terms of the general contract. The owner in *McCoy* had withheld slightly in excess of ten percent of payments made to the contractor prior to the contract breach, and the trial court had awarded the amount retained to the materialman.[387]

On appeal the owner argued that the materialman failed to perfect its statutory mechanic's and materialman's lien in accordance with the relevant statutes and that no other relationship existed between the owner and the materialman that would authorize the materialman to claim the funds that the owner had retained.[388] The court of civil appeals agreed that the materialman had not properly perfected its statutory mechanic's lien, but, relying on the provisions of the trust fund statute in effect at the time cause of action arose, held that the owner retained the amount as a trustee for the benefit of materialmen and mechanics providing labor and materials for the project

385. The specific provision reads as follows:

> Notwithstanding any agreement to the contrary, the holder of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or contract. The debtor must be given at least 20 days to cure the default before the entire debt is due and notice of sale is given.

Id. The problem in construction lies, obviously, in the last sentence. The legislature could have easily made the provision clear by stating "such debtor" or "such residential debtor" instead of "the debtor." The scanty legislative history supports the interpretation that only residential debtors were to receive the additional 20-day notice protection, but without doubt some commercial debtor will raise this provision, along with the customary Deceptive Trade Practices Act claim, in attempting to avoid a foreclosure.

386. 736 S.W.2d 160 (Tex. App.—Tyler 1987, no writ).

387. *Id.* at 162.

388. The statutory provisions governing perfection of a mechanic's and materialman's lien are found at TEX. PROP. CODE ANN. §§ 53.051-.059 (Vernon 1984).

and upheld the trial court's judgment awarding this amount to the materialman.[389] The court specifically held that the materialman's right to the trust fund was superior, even in light of its failure to properly perfect its statutory lien.[390]

Cabintree, Inc. v. Schneider[391] dealt with the question of when a subcontractor must send notice to an owner to duly perfect a mechanic's lien. The subcontractor had supplied kitchen cabinets for home improvements but was not paid by the general contractor. The subcontractor gave the owners a notice that it had not been paid and subsequently filed an affidavit in accordance with the appropriate statutes on the last possible day to perfect its lien rights. The subcontractor, however, did not send a notice or copy of its lien affidavit to the homeowner until several months later, after the owner had paid the ten percent statutory retainage withheld to the general contractor.[392] The case expressly presented the question of when notice of a lien affidavit must be given to a property owner. The court noted that it had found no case dealing with this question under the codification of the mechanic's and materialman's lien statutes in the Texas Property Code, and held that notice must be given within the same time period as required for filing of the lien affidavit.[393] In reaching this decision the court stated that section 53.055 of the Texas Property Code, although silent on the issue of when a mechanic's lien claimant must give notice to the property owner, is a recodification of the previous existing statutes that is to be nonsubstantive in nature.[394] The court then referred to the prior effective statute, and based upon the express language of that statute, held that notice of a lien affidavit must be sent to an owner within the same period as is applicable for filing the lien affidavit.[395]

First National Bank v. Chaparral Electric Supply Corp.[396] dealt with competing lien claims of a bank and a materialman. The materialman provided supplies to a general electrical contractor who subsequently went bankrupt. The owner of the property owed the general contractor certain funds. The materialman notified the owner that it had not been paid and agreed to abate filing a mechanic's and materialman's lien. Not having been paid, the mate-

389. 736 S.W.2d at 164. The statute that governed this case was TEX. REV. CIV. STAT. ANN. art. 5472e, *repealed by* Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3475, 3729-30. The successor provision is found at TEX. PROP. CODE ANN. §§ 162.001-.004 (Vernon 1984).

390. 736 S.W.2d at 164.

391. 728 S.W.2d 395 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd).

392. The relevant statute for such notices is TEX. PROP. CODE ANN. § 53.055 (Vernon 1984), which provides that "[a] person who files an affidavit must send two copies of the affidavit by registered or certified mail to the owner at the owner's last known business or residence address."

393. 728 S.W.2d at 396-97.

394. *Id.* at 397.

395. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5453(1), *repealed by* Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3475, 3729-30). Section 1.001 of the Texas Property Code specifically provides, in part, that the program of codification "contemplates a topic-by-topic revision of the state's general and permanent statute law *without substantive change*." TEX. PROP. CODE ANN. § 1.001 (Vernon 1984) (emphasis added).

396. 727 S.W.2d 353 (Tex. App.—Amarillo 1987, no writ).

rialman then sent a lien affidavit to the owner and to the bankrupt general contractor and subsequently instituted suit for the amount owed, seeking foreclosure of its mechanic's lien. The bank intervened, claiming that the amount the owner owed to the bankrupt contractor was an account receivable to which the bank had a prior perfected security interest.

The court of civil appeals reversed the trial court's holding in favor of the materialman, finding that the subcontractor did not give sufficient notice to constitute fund trapping notices under the Texas mechanic's liens statutes since the notice did not specifically notify the owner that it might be personally liable and that the owner's property would be subject to a lien unless it withheld payments from the general contractor and otherwise paid or settled the bill.[397] The court, however, awarded the materialman ten percent of the amount of the contract since the owner was statutorily required to retain that amount as a fund for mechanics and materialmen pursuant to the relevant statutes, and since the materialman sent a sufficient notice to claim a lien for this amount.[398]

House Bill 1160[399] modifies the provisions of the Texas Property Code dealing with mechanic's and materialman's liens, requiring any person furnishing labor or materials for a construction project, upon request and as a condition for final payment therefor, to provide to the requesting party an affidavit stating that such person has paid in full each of its subcontractors, laborers, and materialmen or, if it has not done so, stating in the affidavit the amount owed to each party and their names.[400] Similarly, the seller of any real property, if requested prior to closing, is obligated to provide a similar statement.[401] The act further amends section 162 of the Texas Property Code, which deals with trust funds in a construction disbursement context, and defines when a trustee acts with intent to defraud. Such intent exists if the trustee retains, disburses, or diverts trust funds with the intent to deprive the beneficiaries of the funds.[402]

B. Other Liens

In *Inwood North Homeowners' Association, Inc. v. Harris*,[403] a case of first impression in Texas, the Texas Supreme Court upheld the right of a nonprofit homeowners association to foreclose a lien established by the restrictive covenants for a developed subdivision.[404] The homeowners' association, which itself was established by the restrictive covenants in question, brought

397. *Id.* at 356. The relevant statues are found in TEX. PROP. CODE ANN. §§ 53.001-.240 (Vernon 1984). Section 53.056 specifically requires notice of the owner's potential liability in order to trap funds in the hands of the owner for the benefit of subcontractors. *Id.* § 53.056.

398. 727 S.W.2d at 356 (citing TEX. PROP. CODE ANN. § 53.101 (Vernon 1984)).

399. Act of June 18, 1987, ch. 578, § 1, 1987 Tex. Sess. Law Serv. 4561 (Vernon) (codified at TEX. PROP. CODE ANN. § 53.085 (Vernon Supp. 1988)).

400. *Id.*

401. *Id.*

402. Act of June 18, 1987, ch. 578, § 3, 1987 Tex. Sess. Law Serv. 4562 (Vernon) (codified at TEX. PROP. CODE ANN. § 162.005 (Vernon Supp. 1988).

403. 30 Tex. Sup. Ct. J. 584 (July 15, 1987).

404. *Id.* at 587.

action against certain homeowners who were delinquent in payment of maintenance assessments established by the restrictive covenants, seeking foreclosure of the lien also established by the restrictive covenants.[405] The trial court and court of civil appeals found against the association, holding that the lien established by the restrictive covenants, which was characterized as a vendor's lien, did not constitute a vendor's lien as the assessment charges were not part of the purchase price for the property. Accordingly, the association could not foreclose against the homeowners for a default in payment of the assessment charges.[406]

The supreme court agreed that the lien established by the restrictive covenants could not be properly characterized as a vendor's lien because the assessments in question were not part of the purchase consideration for the lots.[407] The court, however, determined that the provisions of the restrictive covenants were sufficient to establish a contractual lien.[408] The court then addressed what it characterized as the crux of the matter, whether Texas homestead law would render the contractual lien ineffective. The court determined, as one basis for its holding, that the lien should be upheld since it encumbered the property prior to the establishment of the homestead.[409] The court found that the restrictive covenants in question touched and concerned the land, that privity existed because of the successive conveyance of fee simple estates, and that the purchasers were bound by the restrictive covenants since the deeds referenced them and the restrictive covenants were in the chain of title of the lot purchasers.[410] As a second basis, the supreme court held that the homestead right may attach only to the extent of the property interest that is acquired by the party claiming the right.[411] The court found that since the purchasers acquired the obligation to pay the maintenance assessments and the lien reserved in the restrictive covenants as part of the property interest, the liens were superior to the homestead claim and were entitled to protection.[412]

In *Keda Development Corp. v. Stanglin*[413] the appellate court, on remand from the Texas Supreme Court, set aside the bulk execution sale of three tracts of land.[414] The owner owned four parcels of land, three of which faced a road for which the city of Dallas made paving assessments. Upon the owner's failure to pay these assessments, the city obtained a judgment and the sheriff subsequently sold all three parcels in a bulk sale to one pur-

405. *Id.* at 584-85.

406. Inwood North Homeowners' Ass'n v. Pamilar, 707 S.W.2d 125, 126 (Tex. App.—Houston [1st Dist.] 1986, writ granted).

407. 30 Tex. Sup. Ct. J. at 585.

408. *Id.* (citing Maryland Cas. Co. v. Willig, 10 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1928, writ ref'd)).

409. 30 Tex. Sup. Ct. J. at 586.

410. *Id.*

411. *Id.* at 586.

412. *Id.* at 587 (citing Johnson v. First S. Properties, Inc., 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (upholding right to foreclose lien established by a condominium declaration)).

413. 721 S.W.2d 897 (Tex. App.—Dallas 1986, no writ).

414. *Id.* at 904.

chaser in satisfaction of the judgment. The owner filed suit to set aside the sale, alleging that sales should have been conducted as to each individual parcel until a sufficient amount was received to pay the judgment. The trial court set aside the bulk sale, and the court of civil appeals previously reserved this decision. The supreme court, however, held that some evidence existed that the bulk sale may have contributed to the receipt of grossly inadequate consideration.[415] On remand, in light of the supreme court's determination, the court of appeals affirmed the trial court judgment that sufficient evidence existed to support the finding that the sale in bulk contributed to a gross inadequacy in consideration.[416] The purchaser at the execution sale contended that the previous owner could not challenge the method by which the sale had been conducted, arguing that the sheriff's deed was conclusive evidence of the sale's regularity. The court found that this argument had no merit because the statute that the purchaser relied upon dealt with extrajudicial sales by a city tax assessor and collector, a course which the city had not followed.[417] The court of civil appeals, however, upheld the purchasing party's claim for reimbursement for insurance premiums paid during the time that it held title to the land.[418]

415. Stanglin v. Keda Dev. Corp., 713 S.W.2d 94, 95 (Tex. 1986).

416. 721 S.W.2d at 901. The court noted that the owner had presented uncontroverted evidence that a single unimproved parcel, in and of itself, had sufficient value to bring an amount in excess of the judgment. *Id.* at 900.

417. *Id.* at 901 (citing TEX. REV. CIV. STAT. ANN. arts. 1059, 1092 (Vernon 1963)).

418. *Id.* at 902-03. The court found no controlling authority for reimbursement for insurance expense although the court did find authority for reimbursement of other expenses (citing Elam v. Donald, 58 Tex. 316, 318 (1883); Burns v. Ledbetter, 56 Tex. 282, 285 (1882); Mitchell v. Reitz, 269 S.W.2d 279 (Tex. Civ. App.—El Paso 1924, writ dism'd) (purchaser of lands under void judgment entitled to reimbursement for payment of delinquent taxes)). The court also noted that upon setting aside the execution sale, the parties should be returned to the status quo to the greatest extent possible (citing House v. Robertson, 89 Tex. 681, 688, 36 S.W. 251, 253 (1896)). The court also noted that the policy of the law is to sustain execution sales and parties should not be penalized for relying on the regularity of a sale conducted by a public official. 721 S.W.2d at 903.